

CAFBMAR1

Trial

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 MARLEN MARTINEZ,

4 Plaintiff,

5 v.

10-CV-5163 (CM)

6 ST. BARNABAS HOSPITAL,

7 Defendant.

Jury Trial

8 -----x

New York, N.Y.
October 15, 2012
9:42 a.m.

10 Before:

11 HON. COLLEEN McMAHON,

12 District Judge

13 APPEARANCES

14 LAW OFFICES OF LEE NUWESRA
15 Attorneys for Plaintiff
16 BY: LEE S. NUWESRA, ESQ.

17 EPSTEIN BECKER & GREEN, P.C.
Attorneys for Defendant
18 BY: DAVID W. GARLAND, ESQ.
JOHN F. FULLERTON, III, ESQ.

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1 (Trial resumed)

2 (In open court; jury not present)

3 THE DEPUTY CLERK: Case on trial is Martinez v.
4 St. Barnabas, 10 Civ. 5163. Plaintiff is here; defendant is
5 here; jurors are in the jury room.

6 THE COURT: Well, somehow miraculously our jurors got
7 in the building. The marshals must have done a great job
8 because there are a million people picking today and we have a
9 million jurors standing in lines outside the building.

10 So who is our next witness?

11 MR. GARLAND: Pauline Frances-Lattery.

12 THE COURT: Ms. Lattery, come on up.

13 Let's get the jurors in the box.

14 MR. NUWESRA: Your Honor, I have plaintiff's exhibits
15 for the jurors just like the defendants did.

16 THE COURT: That's fine. Pass them out. Put them on
17 the chairs.

18 MR. NUWESRA: Thank you, your Honor.

19 (Jury present)

20 THE COURT: Good morning, everyone. Aside from this
21 being a miserable day, all weekend it was a lovely one and I
22 hope everyone got a lot of rest and had a great weekend. We
23 are ready to resume.

24 You have two exhibit binders now. There's a
25 plaintiff's exhibit binder, as well. Mr. Nuwesra will call

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1 your attention to exhibits at various times when he wants to do
2 so. So you know the rules. Keep them close until it's time to
3 look at them and then look at only the exhibit that you've been
4 called to look at.

5 Call your next witness, please.

6 MR. GARLAND: Calling Pauline Frances-Lattery.

7 PAULINE FRANCES-LATTERY,

8 called as a witness by the Defendant,

9 having been duly sworn, testified as follows:

10 DIRECT EXAMINATION

11 THE DEPUTY CLERK: Please state and spell your name
12 for the record.

13 THE WITNESS: My name is Pauline Frances-Lattery,
14 L-a-t-t-e-r-y.

15 THE COURT: Have a seat, ma'am.

16 THE WITNESS: Thank you.

17 THE COURT: You're talking to those folks over there
18 in the box. If you'd use the microphone, I'd be grateful. So
19 would the court reporter.

20 You may inquire.

21 MR. GARLAND: Thank you, your Honor.

22 DIRECT EXAMINATION

23 BY MR. GARLAND:

24 Q. Where are you currently employed?

25 A. I'm currently employed at St. Barnabas Hospital in the

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1 Bronx.

2 Q. How long have you been working there?

3 A. I've been working there for over 25 years.

4 Q. So you started approximately when?

5 A. In 1997, the 5th of May, I started at St. Barnabas
6 Hospital.

7 Q. When you started at the hospital, what was your job?

8 A. I started as a med-surg nurse on the medical-surgical unit.
9 And that was my first position there.

10 Q. Just briefly, what did you do in that job?

11 A. In that job I used to-- I was a staff nurse on that floor,
12 reporting to a charge nurse. I had in my care about eight to
13 nine patients. I used to work the day shift.

14 Q. Did you have a next job at St. Barnabas?

15 A. Yes. After that I went to the intensive care unit as a
16 staff nurse. I had been on that unit for about a year and six
17 months.

18 Q. What did you do in that position?

19 A. In that position, I was caring for critical care patients
20 of different type of illnesses. And it depends on what part of
21 the unit I was working. You could have two patients or, if it
22 was a telemetry unit, I would have five patients.

23 Q. By the way, what is telemetry?

24 A. Telemetry is a monitoring unit. Monitoring means we have
25 leads on the patient's chest where you're monitoring the heart,

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1 the pulse, the respiration and blood pressure. And that level
2 of care is where the nurse and the physicians and other
3 consultants will be caring for that patient, and they require
4 every-four-hour monitoring.

5 Q. Now, did you have a next job at St. Barnabas?

6 A. After that I got promoted to the nursing supervisor for a
7 neuro floor, which was the seventh floor. That was my first
8 management role.

9 Q. When you refer to the "neuro floor," what does that mean?

10 A. Patients that were neurological and nurses. Could be a
11 stroke patient or a patient that had a stroke. We had the
12 second level of where they had traumatic brain injury, so
13 they're not as acute as they are in I.C.U. It was really a
14 medical-surgical care.

15 Q. You said that was your first management job. So what did
16 you do in that role?

17 A. In that role, I was a supervisor for about 30 staff
18 members, which consisted of registered nurses, L.P.N.s, nursing
19 attendants and unit clerks on the day shift for eight hours.

20 Q. For about how long did you stay in that role?

21 A. I stayed in that role for about a year and six months.

22 Q. Did you have a next job at St. Barnabas?

23 A. Then I went to the night shift, after having my second
24 child, as an administrative night supervisor, where my role was
25 to cover the hospital was a second supervisor.

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1 Q. And in that role, covering the hospital as a second
2 supervisor, what does that mean?

3 A. That role was a larger role. My responsibility was to
4 oversee the hospital when my director was off. It was really
5 on the night shift, 11 to 7 shift. I was the second
6 supervisor, really overseeing the function of the hospital from
7 the nursing aspect along with the physicians. Really, making
8 sure that the patients' level of care was met.

9 Q. For about how long did you hold that position?

10 A. I had that position for about six years.

11 Q. Did you have a next job then at St. Barnabas?

12 A. Then I moved back to the intensive care unit, but in a
13 different role. I became the nurse manager for the intensive
14 care unit.

15 Q. About when was that?

16 A. That was in December of 1999.

17 Q. What did you do in that job?

18 A. This role -- which I'm presently still in that role -- I
19 was a manager, and I am the manager, of the over-90 staff. The
20 intensive care unit consists of 36 beds, where we would see
21 acute patients, very acute, traumatic, cardiac, stroke
22 patients. And then we have another level of care where the
23 patients could be, like, post-op surgeries. That would be in
24 the telemetry unit.

25 Q. Briefly describe your educational background. What degrees

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1 do you hold?

2 A. I have a bachelor's degree in nursing, which I obtained
3 in-- I was trained in Jamaica, where I obtained my nursing and
4 my bachelor's degree in nursing in Jamaica. And then I
5 acquired my master's in nursing in 2008 in College of New
6 Rochelle.

7 Q. Focusing on the period of around September 2009, what role
8 were you in then?

9 A. In 2009 I was a nurse manager for the intensive care unit.

10 Q. So at that time, who reported to you? Briefly describe who
11 would report to you.

12 A. The registered nurses. I had 92 staff, which consists of
13 about 60 or 62 nurses, of regular nurses. I had nursing
14 attendants, unit clerks, patient care technicians, monitor
15 watchers. That's about it really.

16 Q. Again, same time period, about round September of 2009, who
17 did you report to?

18 A. I reported then to Cathy Graham, who was the director of
19 nursing.

20 Q. Now, on or about September 14, 2009, did you become aware
21 that there may have been some Morphine missing in the I.C.U.?

22 A. Yes. I made my usual call -- I have 24-hour responsibility
23 for my unit, sir, in the afternoon. In the evening, I had
24 called my unit just to see how things were going.

25 Q. Who did you speak with?

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1 A. I spoke with the charge nurse, who then led me to speak to
2 the supervisor who was working that evening.

3 Q. Who was the supervisor?

4 A. It was Ms. Norma Ondoy.

5 Q. What did you learn that evening about apparently missing
6 Morphine?

7 A. Well, what she had to relate to me were that they were
8 investigating that there was some missing Morphine. And they
9 were in the process of investigating where it could be, what
10 happened, and reviewing the charts of patients at that time.

11 Q. What, if anything, did you say to her when you learned
12 that?

13 A. I said to her definitely get statements from all the
14 persons-- the nurses who were involved and make sure Cathy
15 Graham is aware of that.

16 Q. Did you have any further involvement that evening in
17 looking into the missing Morphine?

18 A. No, I did not.

19 Q. When was your next involvement?

20 A. The next day.

21 Q. What happened the next day?

22 A. Ms. Norma Ondoy had provided all the statements that she
23 had obtained that evening, and it was left in my mailbox for me
24 to follow through to speak to Cathy Graham following that.

25 Q. You have a black binder in front of you. I want to ask you

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1 to turn to Defendant's Exhibit A, to Tab 8.

2 A. Could you repeat that again, please?

3 Q. I'd like you to turn to Defendant's Exhibit 8. There
4 should be a Tab 8. It may say DX 8; it may say 8.

5 A. Yes, I'm there.

6 Q. You mentioned that the next day when you came in, you
7 received something in your mailbox.

8 A. Yes.

9 Q. Looking at the first page of Defendant's Exhibit 8, was
10 that what you were referring to?

11 A. Yes. This is what I had received, a copy of what I had
12 received.

13 Q. Then, if you turn to the next page of Defendant's Exhibit
14 8, was that in your mailbox, as well?

15 A. Yes, it was.

16 Q. You also mentioned nurses' statements. I want to ask you
17 to turn to Defendant's Exhibit 9 in that same notebook.

18 A. Okay.

19 Q. Was that statement in your mailbox?

20 A. Yes, it was.

21 Q. I want you to turn to Defendant's Exhibit 10, and when you
22 get there, ask you, was that exhibit in your mailbox?

23 A. Yes, it was.

24 Q. Now I'm going to ask you to jump all the way to Defendant's
25 Exhibit 26. Was a copy of that statement in your mailbox?

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1 A. Yes, it was.

2 Q. Now if you would turn to Defendant's Exhibit 27. Was a
3 copy of that statement in your mailbox?

4 A. Yes, it was.

5 Q. Now I'd like you to turn to Defendant's Exhibit 28. Was a
6 copy of that statement in your mailbox?

7 A. Yes, this was in my box.

8 Q. And then I'd like to ask you to turn to Defendant's Exhibit
9 29. Was a copy of that statement in your mailbox?

10 A. Yes, this was in my box. Yes.

11 Q. So after you received these documents in your mailbox on
12 the 15th, what did you do next?

13 A. I had consulted with Cathy Graham and told her that I had
14 obtained all the statements, which she knew what they were.
15 And then we spoke to pharmacy, which consisted of two persons
16 from the pharmacy department -- and my educator then was Agnes
17 Lucero -- and myself, Jose. At that time we decided to
18 interview the nurses.

19 Q. Decided to interview which nurses?

20 A. The nurses from the statements that we had obtained.

21 Q. Who was it in the pharmacy that you spoke with?

22 A. Patricia Byrne and Fran Gatto.

23 Q. What was Patricia Byrne's position?

24 A. She was a director of the pharmacy department.

25 Q. And how about Fran Gatto? What was her position?

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1 A. Fran Gatto was one of the pharmacy consultants. As far as
2 narcotics were concerned, that's who we used to-- when we have
3 a missing medication, this is the person we would speak to.

4 Q. You also mentioned Agnes Lucero. What was Ms. Lucero's
5 role, generally speaking, in September of 2009? What function
6 did she perform?

7 A. Agnes Lucero was the intensive care unit educator. She was
8 the person who did all the critical care training for the
9 I.C.U. nurses which consist of over a six-month period. She
10 would follow them through on the units. So she basically was
11 the educator for the I.C.U.

12 Q. Now, did you and Ms. Byrne, Ms. Gatto and Ms. Lucero then
13 meet with anyone?

14 A. Yes, we did. We met with all the nurses individually in
15 the conference room.

16 Q. What was the purpose of meeting with the individuals--
17 meeting with the nurses individually in the conference room?

18 A. We had a copy of their statements. And we went through
19 their statements and we wanted to finalize exactly what
20 happened that evening. We were trying to further-- continue
21 the investigation of the missing Morphine.

22 Q. By the way, about what time were these meetings? Let me
23 ask this: About what time did those meetings take place?

24 A. It was, I would say, before-- between 10 and 11:30. And I
25 don't recall exactly the time, but I remember that particular

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1 day, it was Nursing Appreciation Day, and we had to investigate
2 that. It indefinitely had to be done. I know it was before
3 lunchtime, though.

4 Q. Now, following those interviews, what happened next?

5 A. Following those interviews, Patricia Byrne, the director of
6 pharmacy, had typed up all the-- what was sent to us from each
7 nurse, and it was forwarded to Cathy Graham at that time, if I
8 remember.

9 Q. What, if anything, did you do next about looking into the
10 missing Morphine?

11 A. After that I spoke to-- I spoke to Cathy Graham. I was
12 waiting for the response, what was to be done next, based on
13 the findings from the statements that was obtained.

14 Q. What were the findings based upon the statements obtained?

15 A. There was a discrepancy between two nurses. There was a
16 notation on the narcotics sheet where one nurse before had
17 stated that she had changed the time on it, and then the second
18 nurse that we spoke to regarding that said the same-- the
19 similar story.

20 Q. Who were those two nurses?

21 A. That was Cora Fischer I had spoken to first, who had an
22 entry on the narcotic sheet for her patient. And the time was
23 written over and I asked her who changed the time, and she said
24 she did.

25 The second nurse I spoke to was Marlen Martinez, and

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1 Marlen Martinez stated that she had changed the time on the
2 same entry that Ms. Fischer had mentioned.

3 Q. Were there any other findings that you can recall at the
4 moment from your interviews?

5 A. There were entries on the narcotics sheets that were blank,
6 and that we had addressed with one of the nurses that we
7 interviewed, Ms. Anna Ricca Libiran.

8 Q. Did you speak with anyone else in I.C.U. including any
9 doctors in connection with your interviews?

10 A. At that point in time, Dr. Adler, the director of the
11 intensive care unit, after Patricia Byrne had met with us in
12 the conference room. And we had looked at what was missing.
13 The determination at that time was to have further testing done
14 on one of the patients.

15 Q. Explain what you mean by that.

16 A. Okay. There was a patient that went for an MRI study
17 coming from the telemetry area, and that particular patient was
18 supposed to have received Ativan to be able to have the MRI
19 done. Based on how the patient behaved when the patient went
20 down for the test, the patient was agitated and the condition
21 had changed and the test could not have been done. So the
22 determination was to do further testing on that patient.

23 Q. Did you speak-- well, when you say the determination was
24 made to have further testing done, what do you mean by that?

25 A. Dr. Adler had assessed the patient along with the resident

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1 and deemed that the patient was-- something-- there was some
2 things done with that patient. The patient's condition had
3 changed. So he had ordered a urine specimen for that patient.

4 Q. After the interviews, did you do anything else besides
5 speaking with Dr. Adler and speaking with Cathy Graham as part
6 of trying to find out what happened to the missing Morphine?

7 A. No. I was waiting for instructions from Cathy Graham based
8 on the findings that we had, that we found.

9 Q. Did you learn during the course of that day the results of
10 the testing that Dr. Adler had ordered?

11 A. Yes. We learned from-- Dr. Adler informed us that that
12 patient that came in, this particular patient we were concerned
13 about came in negative to opiates, was positive for opiates in
14 the urine. And at no time was opiates ever ordered for this
15 patient during the care-- during the time that the patient was
16 admitted to the hospital from emergency room to our care.

17 Q. Did you share that information with Ms. Graham?

18 A. Yes, I did, along with-- yes, I did, along with Patricia
19 Byrne. We both shared it with her.

20 Q. So what happened next? You said you were waiting for
21 instructions from Ms. Graham. What happened next?

22 A. What happened next is it was deemed that because of the
23 discrepancy in the stories by both nurses, Cora Fischer and
24 Marlen Martinez, that both nurses would be suspended pending
25 investigation because we needed to investigate further as to

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1 why was both nurses saying that they made changes and, of
2 course, with the patient being positive for opiates in the
3 urine. That was part of the further investigation that needed
4 to be done.

5 Q. Once that determination was made, what did you do next?

6 A. I was instructed to suspend both nurses. And we -- at the
7 end of the shift, when both nurses were completed with their
8 shift, that's after 7:00, they were instructed to come to the
9 classroom with a union delegate. Myself and Norma Ondoy and
10 both nurses along with the union delegate were in the
11 conference room where the suspension was presented to both
12 nurses and their documentation.

13 Q. Who instructed you to suspend both nurses?

14 A. Cathy Graham.

15 Q. So how did-- well, did you do anything to get the two
16 nurses to the conference room?

17 A. Well, I waited for them to complete their shift. When I
18 spoke to the nurses while on the unit, I said, "When you're
19 finished with your shift, I need to meet with you in the
20 conference room upstairs. But please bring a union delegate,
21 and myself and someone from administration will be meeting with
22 you."

23 Q. You had that conversation with Ms. Fischer?

24 A. With Ms. Fischer and with Marlen Martinez.

25 Q. And did Ms. Martinez say anything to you when you told her

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1 that?

2 A. I don't recall.

3 Q. Now, what happened next in terms of moving the time line
4 forward? Was there a meeting in the conference room?

5 A. Yeah. Both nurses came to the conference room, met with
6 me, Ms. Ondoy and Lisa Greene, the union delegate. I relayed
7 to both nurses what the suspension was going to be about.

8 "We're suspending both of you because there was a discrepancy
9 in your stories until further investigation." And Lisa Greene,
10 the union delegate, was present.

11 The union delegate, Lisa, asked us to step out. On
12 stepping out of the room, myself and Ms. Ondoy, there was words
13 exchanged between both nurses: "You didn't tell me." I don't
14 recall who was saying what, but that's what I overheard on
15 exiting the room.

16 Q. Now, did you say you had actually prepared written
17 suspension notices?

18 A. I beg your pardon?

19 Q. Did you actually prepare written suspension notices?

20 A. Yes, I did.

21 Q. I'm going to ask you, in the black notebook in front of
22 you, to turn to, first, Defendant's Exhibit 17.

23 Is that the suspension notice that you prepared for
24 Ms. Fischer?

25 A. Yes, it is.

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1 Q. Now, I want to ask you specifically with regard to what is
2 written in the "details" section. Whose handwriting is that?

3 A. That's my handwriting.

4 Q. Since it's your handwriting, would you please read verbatim
5 what you wrote in that detailed section?

6 A. "Conflicting story"-- "Number 1, Conflicting story.

7 "Two, not telling the truth. Stated that she was the
8 one who changed the time on the drug disposition record and
9 24-hour nursing audit form." And see attachment. There was an
10 attachment to this.

11 Q. Do you recall what that attachment was?

12 A. That was a copy of the narcotic sheet, the drug disposition
13 record. That was a copy of it.

14 Q. Then is your signature on this form?

15 A. My signature's on top, R.N. nurse manager; Pauline Lattery,
16 R.N. nurse manager; and below is Catherine Graham.

17 Q. Then let me ask you next to turn in that same notebook to
18 Defendant's Exhibit 15.

19 Is that another suspension notice that you prepared on
20 September 15?

21 A. Yes, I did.

22 Q. Who was that suspension notice directed to?

23 A. Marlen Martinez.

24 Q. Again in the "Details" section, do you know whose
25 handwriting appears there?

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1 A. That was my handwriting.

2 Q. Again, since it's your handwriting, would you please read
3 for the jury what it is that you wrote in the "Details"
4 section?

5 A. Okay. "Conflicting story. Stated she changed the time on
6 the narcotic sheet. There is evidence of positive opiates on
7 patient in 527A who was under her care. The scheduled
8 procedure for this patient was done. The patient's blood
9 pressure had dropped 80/40. Please see attachment."

10 Q. Again, there doesn't appear to be an attachment here in
11 this exhibit.

12 A. No.

13 Q. Do you recall what the attachment was?

14 A. I believe it was the-- a copy of the narcotic sheets and a
15 copy-- I don't recall if the second copy was a copy of the
16 opiate results of the patient.

17 Q. Is your signature on this suspension notice?

18 A. Yes, it is.

19 Q. Now, after this meeting that you had with Ms. Fischer and
20 Ms. Martinez, and also Ms. Ondoy was present and Ms. Greene was
21 present, did you have any further involvement in trying to find
22 out what happened to the missing Morphine?

23 A. We-- after that day there was an investigation continuously
24 going on. What happened was --

25 Q. Well, did you have any personal involvement in that?

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1 A. No, I did not, not alone. It was myself and the pharmacy.

2 Q. Then let's go back to the meeting. You mentioned Ms. Ondoy
3 was there at the suspension meeting with you, Ms. Greene,
4 Ms. Fischer and Ms. Martinez.

5 A. Right.

6 Q. Why did you want Ms. Ondoy there?

7 A. Cathy Graham had stated that I need a representative from
8 administration. And she was the administrator supervisor
9 scheduled that evening, so I had asked her to be present while
10 I had to give the discipline.

11 Q. Let's change subject matters now altogether. And I want to
12 ask you, focusing now on the period between around 2002 and
13 2009, September of 2009. Were there times that there would be
14 a charge nurse or nurses working in the I.C.U.?

15 A. Yes there was.

16 Q. Now, first, during that time frame, what is a charge nurse?

17 A. The charge nurse's role in the I.C.U. was to oversee the
18 functionality of the unit, which involves ensuring that the
19 assignment for each nurse was done, nursing attendant, unit
20 clerk, PCT, patient care tech, was set and with their break
21 time. To really run the unit to make sure we're getting
22 admissions and discharge and every patient was cared for and to
23 do rounds with the attending on each patient. That's it in a
24 nutshell.

25 Q. Now, again, focusing on that same period, but let's focus

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1 now a little more precisely toward the beginning of that
2 period, so closer to 2002 than September 2009.

3 Did you know what the process was then of how a charge
4 nurse in the I.C.U. would be selected?

5 A. The charge nurse in the I.C.U. was selected on rotation.
6 They had a rotation book that was kept; that if you were in
7 charge, you would log it in and it's your turn to be in charge.
8 So it was really on a rotation basis.

9 Q. And when you say "rotation," who rotated?

10 A. All the nurses are rotated to that role.

11 Q. Including Ms. Martinez?

12 A. Yes.

13 Q. At some point during that period between 2002 and September
14 2009, did the selection process for who was going to be the
15 charge nurse change?

16 A. Yes, it did.

17 Q. How did it change?

18 A. It changed-- the administration and the attendings and the
19 trauma attendings came to me. And because the unit was getting
20 so extremely busy, they had said, "Pauline, we're going to have
21 to have the role of the charge nurse changed. I want really
22 the more senior nurses, the experienced nurses, in that role to
23 run that unit." That was a meeting they had with me as a
24 manager and Dr. Adler as a director of nursing. And because we
25 were projected to look at other-- to admit other types of

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1 patients, because we were going to become a chest pain unit,
2 there was going to be a lot more admissions and discharges, so
3 they wanted certain nurses to be in that role.

4 Q. What was your role in selecting who would be the charge
5 nurse?

6 A. My role was to suggest some of the nurses. I was not the
7 final decision-maker. It was decided on as a committee,
8 because the interaction of the nurse with our departments --
9 would be the ER, the OR and the trauma doctor -- was a big
10 thing. When I spoke at that time at the meeting, those were
11 the other parties that were at the meeting. And they wanted
12 charge nurses that they would be able to communicate very
13 easily with and be able to get things done in a fluent manner.

14 Q. When you say you had some input --

15 A. I had some input, but the greater input really came from
16 the administrative body as far as who should be in that role.

17 Q. What was your input, though, in terms of-- were there any
18 criteria that you considered when you were providing your input
19 as to who should be selected as a charge nurse?

20 A. Well, the charge nurse-- I looked at the nurses who had the
21 capability of doing it. Not everyone likes to be in charge. I
22 looked at the nurse who would be-- and who will be able to
23 interact with other departments and would not be a hindrance in
24 trying to get the patients admitted and discharged and whatever
25 care they needed.

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1 So my role as a manager is to look at my nurses across
2 the board. And most of these nurses were the more senior
3 nurses because they had the most experience in that role.

4 Q. And when you say most senior, what does that mean? What do
5 you mean specifically by that?

6 A. Years of experience. I have a lot of nurses in my I.C.U.
7 who have been there for over 20 years. And 18 to 20 years is a
8 majority of my nurses. I do have nurses who are younger than
9 that, you know, in that role.

10 Q. Did Ms. Martinez ever speak with you about who was selected
11 as a charge nurse following what you're now describing?

12 A. She had mentioned it once, why she wasn't selected in that
13 role. And she had mentioned she felt like she should have been
14 in that role, because during the time when we did not see--
15 when we had a rotation, she was in charge for those occasions.

16 Q. Did you respond at all to what she said about that?

17 A. I had mentioned to her why the selection had been done, but
18 that they had changed the role of the charge nurse and they
19 wanted to select a core of certain type of-- certain nurses for
20 that role.

21 Q. Now, was there a nurse by the name of Laurie Verzonilla who
22 worked in the I.C.U. back in 2009?

23 A. Yes, there is.

24 Q. Did there come a time when there was an issue or a problem
25 with one of the patients for whom she was caring who was

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1 suffering from a traumatic brain injury?

2 A. Yes, there was.

3 Q. Did you have any role in following up with her following
4 that incident?

5 A. Yes. As a result of the incident, which went to a root
6 cause analysis, it was deemed that her skills needed to be
7 upgraded. It was not sharp enough in addressing-- in
8 recognizing this traumatic brain injury patient. And that was
9 obtained through the root cause analysis team.

10 Q. So can you describe it in a little more detail then? What
11 happened following the root cause analysis? Specifically with
12 regard to Ms. Verzonilla, what, if anything, she had to do.

13 A. After the root cause analysis, what was done, she had to
14 reeducate herself on traumatic brain injury patients, mainly
15 looking at why -- when the patient is getting ill or the
16 condition is changing, recognizing the signs and symptoms.
17 Like when the temperature is going up or if the patient's
18 responsiveness is different.

19 Those are a few and there's a lot more she had to
20 address. She had to review the cases and, also, she had to
21 present -- do a PowerPoint presentation to the intensive care
22 unit. She works mainly the night shift, so she'll come on the
23 day shift. And she did -- at that time did in-service to all
24 of the nurses in the classroom with a PowerPoint presentation
25 with the support of the director of nursing as well as the

CAFBMAR1

Frances-Lattery - direct

1 director of I.C.U., medical director, Dr. Adler. And she
2 educated both the day nurses and the night nurses.

3 In conjunction to that, she had to do a QI for the
4 traumatic brain injury by monitoring all TBI patients. And
5 that was monitored closely, filling out all those forms,
6 addressing each individual patient.

7 Q. You just used the letters, I think, "QI." What is that?

8 A. Quality assurance. It's really monitoring of, in this
9 instance -- it's like a performance improvement. She was
10 looking at all traumatic brain injury patients to recognize the
11 same type of illness as a form of performance improvement. It
12 could be QI or quality improvement or performance improvement,
13 PI.

14 Q. Did you ever perform an annual performance appraisal for
15 Ms. Martinez?

16 A. Yes, I did.

17 Q. Did you perform one in 2009?

18 A. No, I did not.

19 Q. Why did the not?

20 A. Because that year the evaluations were changed. They were
21 due October of each year, and I had until October the 31st to
22 do it of 2009.

23 Q. So did you ever then speak with Ms. Martinez about her
24 performance evaluation in 2009?

25 A. I didn't have that conversation with her in 2009, no.

CAFBMAR1

Frances-Lattery - direct

1 Q. Did you have a conversation with her in 2009 where she was
2 talking about being treated unfairly in the workplace and that
3 you told her she should go see --

4 MR. NUWESRA: Objection, your Honor. Leading.

5 THE COURT: The objection is sustained.

6 Q. Did you have any conversation in 2009 with Ms. Martinez
7 where you --

8 THE COURT: About the issue of how she was being
9 treated in the workplace. Did you have any such conversation
10 in 2009? Let's start with the general.

11 MR. GARLAND: Thank you, your Honor.

12 A. The only conversation Ms. Martinez had with me is in the
13 in-charge role, where she felt that she should have been in
14 charge in the I.C.U. That's the only-- I didn't have any other
15 conversation with her.

16 Q. And the one about the charge nurse that you described a
17 little while ago?

18 A. The charge nurse role, because it was, as I said, for the
19 most senior nurses at that time. Ms. Martinez was one of our
20 junior nurses and quite often she was floated to the emergency
21 room, to other units, mainly because our more senior nurses, 18
22 and above, are according to the 1999 contracts. Those are
23 nurses that never floated. So the chances of her consistently
24 being in charge when we selected and narrowed it down to those
25 nurses was not as frequent as-- you know, she wasn't in that

CAFBMAR1

Frances-Lattery - direct

1 role.

2 MR. GARLAND: Your Honor, I just want one quick
3 moment. I may be done.

4 Q. One last question or two.

5 Going back to the charge nurse selection, do you
6 recall approximately what year that took place?

7 A. In 2008 we started-- 2008 we started having a selection of
8 core nurses to be in that role.

9 Q. Do you recall approximately how many nurses were selected
10 for that role?

11 A. Approximately four nurses were selected for that role.

12 Q. And at that time approximately how many nurses worked in
13 the I.C.U.?

14 A. About 64. Sixty-four R.N.s.

15 MR. GARLAND: No further questions, your Honor.

16 THE COURT: Mr. Nuwesra.

17 MR. NUWESRA: Thank you, your Honor.

18 CROSS-EXAMINATION

19 BY MR. NUWESRA:

20 Q. Good morning, Ms. Frances-Lattery.

21 A. Good morning.

22 Q. Can you hear me?

23 A. Yes, I can.

24 Q. My name is Lee Nuwesra and I represent Ms. Martinez in this
25 case.

CAFBMAR1

Frances-Lattery - cross

1 A. Sure.

2 Q. Did I hear you right when-- did you testify earlier that
3 you are from Jamaica?

4 A. I grew up in Jamaica, yes.

5 Q. Were you born in Jamaica?

6 A. I was born in England.

7 Q. In England?

8 A. Yes.

9 Q. So what would you consider your ethnicity or national
10 origin to be?

11 A. West Indian.

12 Q. Okay. Now, I want to bring your attention to the-- to
13 September 15th of 2009.

14 A. Sure.

15 Q. Can you tell me, when was it that you found the statements
16 of the nurses in your box? What time?

17 A. I usually get to work by 6:30. My shift starts at 7. I
18 went to the nursing office, which my mailbox was in the nursing
19 office, around a few-- a quarter-- I would say about a few
20 minutes to 7. That's the time I collected the envelope for my
21 mailbox.

22 (Continued on next page)

23

24

25

Caf4mar2

Frances-Lattery - cross

1 BY MR. NUWESRA:

2 Q. You said that you recall that that day was nurses
3 appreciation day?

4 A. Yes, I do remember it was.

5 Q. What does nurses appreciation day entail?

6 A. Actually it's employee appreciation day. Employee
7 appreciation day was for all the employees of St. Barnabas
8 where they would have a picnic outside and all the employees
9 could go down and take part in it. They would get lunch. Some
10 would get a gift. It depends on what's happening.

11 Q. Who takes care of the patients?

12 A. Who takes care of the patients, the nurses and the doctors.

13 Q. Would you still have a full line of nurses taking care of
14 the patients; during this appreciation you still have the same
15 amount of nurses covering the units?

16 A. They are going downstairs on their lunchtime to attend
17 this.

18 Q. How long is a nurse's lunch break?

19 A. It's an hour.

20 Q. By what time on 15 September 2009 did you get with
21 Ms. Byrne, Ms. Gatto and Ms. Lucero?

22 A. I remember it was before 12:00, I would say from the hour
23 of 10, 10, 10:30; I recall it was before 12:00.

24 Q. Were all the nurses present on that date? Were they all
25 scheduled to work that were involved in this investigation?

Caf4mar2

Frances-Lattery - cross

1 A. No; one nurse had to come from home.

2 Q. Which one is that?

3 A. AnaRicca Libiran.

4 Q. What time was her interview?

5 A. I don't recall exactly what time.

6 Q. Isn't it a fact you interviewed my client between 2 and
7 3:00 in the afternoon on that day?

8 A. I don't recall what time I interviewed her.

9 Q. Did you interview Ms. Fischer before you interviewed my
10 client?

11 A. I believe I did interview Ms. Fischer before I interviewed
12 Ms. Martinez, yes.

13 Q. At what time did you -- withdrawn. Isn't it a fact that
14 you discussed with Dr. Adler the issue of patient N with
15 respect to the MRI after you concluded all the interviews with
16 all the different nurses that were involved?

17 A. Dr. Adler was present with us in the conference room
18 because he was invited after we finished speaking to all the
19 nurses so all of us were there. That's when we discovered
20 that. I didn't speak to Dr. Adler before that time.

21 Q. So I understand you, would it be fair to say that you
22 talked to Dr. Adler after you interviewed all the nurses
23 including my client?

24 A. Yes.

25 Q. Was that the very first time that you spoke to Dr. Adler

Caf4mar2

Frances-Lattery - cross

1 regarding patient N's situation the day before with respect to
2 the MRI?

3 A. When we interviewed on the 15th was the first time I spoke
4 to Dr. Adler.

5 Q. Did you ever tell Ms. Byrne that the toxicology result
6 showed patient N on 15 September showed positive for morphine?

7 A. I was not the person who relayed that to her. The result
8 was obtained and Dr. Adler was the one who relayed that to her.

9 Q. But isn't it a fact Dr. Adler did not request those
10 toxicology tests for patient N until after you all the nurses
11 were interviewed?

12 A. He was at the conference after the nurses were interviewed;
13 that's when it was ordered, yes.

14 Q. How do you know Dr. Adler related to Ms. Byrne that patient
15 N showed positive for morphine on 15 September 2009?

16 A. Could you repeat the question.

17 Q. How do you know that it was Dr. Adler who related to
18 Ms. Byrne that the toxicology result, report of patient N on 15
19 September 2009 was the one that related that it was positive
20 for morphine to Ms. Byrne?

21 A. We are all present when the result came back and he was the
22 one that related to us that it was positive.

23 Q. What time was this?

24 A. I don't recall exactly what time it was.

25 Q. Dr. Adler told everybody at the meeting that patient N's

Caf4mar2

Frances-Lattery - cross

1 toxicology results showed that she was positive for morphine?

2 A. Positive for opiates, yes.

3 Q. Isn't it a fact being positive for opiates and being
4 positive for morphine is two different things?

5 A. As far as I recall, this patient was never ordered morphine
6 or any form of opiates from admission to present. The urine
7 specimen from what I recall for what was relayed to me was
8 always negative; the patient suddenly became positive.

9 THE COURT: Got that. The question is is it possible
10 to be positive for opiates other than morphine; can you get a
11 positive for opiates if you are given a drug other than
12 morphine?

13 THE WITNESS: Yes.

14 THE COURT: You have to be given some opiate in order
15 to test positive for morphine.

16 THE WITNESS: Yes.

17 THE COURT: Morphine is an opiate.

18 THE WITNESS: Yes.

19 BY MR. NUWESRA:

20 Q. Would you please look at DX Exhibit 17 which you looked at
21 earlier regarding Ms. Fischer's suspension. Can you tell me
22 what date did you sign that suspension notice?

23 A. On 15 September 2009.

24 Q. Does Ms. Graham's signature appear there?

25 A. Yes.

Caf4mar2

Frances-Lattery - cross

1 Q. Did she sign it on September 15, 2009?

2 A. She was not present with me that day, Ms. Norma Ondoy was
3 present.

4 Q. When was it that Ms. Graham signed it?

5 A. Ms. Graham signed it I believe the next day.

6 Q. Look at exhibit DX 15. This is regarding the suspension
7 notice as it relates to my client Ms. Martinez, right?

8 A. Yes.

9 Q. You signed that correct?

10 A. Yes, I did.

11 Q. What's the date you signed?

12 A. 9/15/2009.

13 Q. Does Ms. Graham's signature appear there too?

14 A. Yes, it does.

15 Q. When did Ms. Graham sign that?

16 A. She signed it the next day.

17 Q. You stated that at the time you prepared this there were
18 two attachments to it, correct?

19 A. Yes.

20 Q. One was the medication, the medication, the log-in sheet
21 for the medication?

22 A. The narcotics sheet, a copy of the administration, the
23 narcotics sheet, yes.

24 Q. You also testified that also the results of patient N's
25 drug testing for 15 September were also attached, correct?

Caf4mar2

Frances-Lattery - cross

1 A. Yes.

2 Q. Can you tell who me sits on this committee that decides who
3 should be a charge nurse in ICU?

4 A. Who sits on the committee who decided at that time to be
5 charge nurse was myself, Cathy Graham, the director of
6 intensive care unit Dr. Adler at the time.

7 Q. Anybody else?

8 A. Those are the three persons I recall were at the meeting.

9 Q. Isn't it a fact that on September 17, 09 the same patient,
10 patient N couldn't have her MRI done because of agitation?

11 A. I don't recall.

12 Q. Would anything refresh your recollection?

13 A. I really don't recall.

14 Q. Look at what is in front of you which is patient N's
15 medical chart. Look at SB 0448 and tell me if that refreshes
16 your recollection as to whether patient N could not do her MRI
17 on this date?

18 A. Repeat the number.

19 Q. SB, see the numbers on the bottom?

20 A. Yes.

21 Q. 0448.

22 A. I am there.

23 Q. Does that now refresh your recollection that patient N
24 could not have her MRI done on that day?

25 A. No, it does not.

Caf4mar2

Frances-Lattery - cross

1 Q. Look at the following page SB 04449, do you see the note
2 from Dr. Stumacher?

3 A. Yes.

4 Q. Read it to yourself and let me know if that refreshes your
5 recollection that she could not have an MRI done?

6 A. I am not able to make this out and I don't recall anything
7 from this.

8 Q. Isn't it a fact that on 9/15/2009 patient N was under the
9 care of Ms. Fischer not Ms. Martinez?

10 A. As far as I recall if --

11 THE COURT: The question is does that jog your memory
12 that Ms. Fischer was the nurse in charge of this patient; does
13 it, yes or no?

14 THE WITNESS: I don't recall, I don't.

15 THE COURT: It doesn't jog her memory. Next question.

16 Q. Can you look at SB 0706.

17 A. What's the number again.

18 Q. SB 0706. Does that now refresh your recollection that
19 Ms. Fischer was taking care of patient N on that day?

20 A. According to the documentation there is a notation that
21 this patient was under her care on the 15th.

22 MR. GARLAND: Objection; I don't know if it refreshes
23 her recollection or she is just reading the record.

24 THE COURT: Do you have an independent recollection,
25 ma'am. Give me those pieces of paper.

Caf4mar2

Frances-Lattery - cross

1 THE WITNESS: No, I don't.

2 THE COURT: Do you have a memory yourself?

3 THE WITNESS: Of her care, no, I don't.

4 THE COURT: OK. Thank you.

5 Q. Can you tell me in your experience as a nurse for the past
6 25-plus years, can you tell us what it means when a nurse
7 writes the number 2 and the degree on top of it? Does the
8 number 2 with a degree sign on it mean secondary in nursing
9 jargon, secondary to?

10 A. That's the terminology usually written by physicians.

11 Q. Would physicians write 2 with a degree sign meaning
12 secondary to?

13 A. Yes, I have seen it written that way, yes.

14 Q. Can you tell us when a nurse or healthcare provider writes
15 the letters F/U what that stands for?

16 A. F/U usually means follow up.

17 Q. When you met at the conclusion of the meeting, the first
18 investigatory step on 15 September with Ms. Byrne and Dr.
19 Adler, was anybody else there?

20 A. Agnes Lucero was with me, the educator, and Fran Gatto, the
21 narcotics pharmacist.

22 Q. Dr. Adler was there?

23 A. Dr. Adler was not for the whole time but he came in towards
24 the end.

25 Q. Isn't it a fact Dr. Adler was never there when you

Caf4mar2

Frances-Lattery - cross

1 interviewed the nurses?

2 A. No, not for the whole time, no.

3 MR. NUWESRA: Your Honor, may I check with my client.

4 THE COURT: Surely.

5 (Pause)

6 MR. NUWESRA: Thank you, your Honor, I have no other
7 questions at this time.

8 MR. GARLAND: Nothing further.

9 THE COURT: You may step down.

10 Call your next witness.

11 MR. GARLAND: Catherine Graham.

12 CATHERINE GRAHAM,

13 called as a witness by the Defendant,

14 having been duly sworn, testified as follows:

15 DIRECT EXAMINATION

16 BY MR. GARLAND:

17 Q. Where do you currently work?

18 A. St. Barnabas Hospital in the Bronx.

19 Q. What's your current role at St. Barnabas?

20 A. Senior vice president of operations.

21 THE COURT: Move closer to that microphone so we can
22 all hear you more clearly.

23 A. Senior vice president of operations.

24 Q. How long have you been working at St. Barnabas?

25 A. Since 1984.

Caf4mar2

Graham - direct

1 Q. When you began working at the hospital in 1984 what was
2 your first position?

3 A. Registered nurse, staff nurse.

4 Q. In a particular area of the hospital?

5 A. Med-surg, medical-surgical unit.

6 Q. What is the medical-surgical unit?

7 A. It's not an area of specialty. If somebody has a medical
8 condition or they have surgery, they would go to a unit like
9 that.

10 Q. Prior to your beginning in that position what was your
11 educational and licensing background?

12 A. Registered nurse licensed by the State of New York, diploma
13 graduate of the school of nursing.

14 Q. How long did you work in that medical-surgical position?

15 A. Six years.

16 Q. Did you have another position, a next position then at the
17 hospital?

18 A. I then became the nurse recruiter.

19 Q. When you became nurse recruiter, what did you do in that
20 role?

21 A. Tried to recruit nurses both locally and abroad and fill
22 vacancies, assist with transfers from to one position to
23 another, and work on retention of staff.

24 Q. For about how long did you do that?

25 A. I kept the title of nurse recruiter for about three years.

Caf4mar2

Graham - direct

1 My title changed in 1993 to assistant director of nursing, but
2 I still was responsible for recruitment and retention.

3 Q. When your title changed did you have additional
4 responsibilities?

5 A. Yes, I was put in charge of staffing all the nursing units
6 for the hospital.

7 Q. What does that involve?

8 A. Involved knowing your staff, what their backgrounds were,
9 making sure you had adequate skilled competent nurses on the
10 right unit so that the complexity of the patient care matched
11 the background of the nurse that would take care of them.

12 Q. Did you have other responsibilities as assistant director
13 of nursing?

14 A. No, pretty much staffing the hospital and recruiting nurses
15 was a pretty full plate as far as I am concerned.

16 Q. Did you have a next job after that at St. Barnabas?

17 A. Yes. Following that I became director of nursing.

18 Q. Approximately when did you become director of nursing?

19 A. I believe it was around 1997.

20 Q. Did your responsibilities change at all when you became
21 director of nursing?

22 A. Yes.

23 Q. How did they change?

24 A. I was responsible to do the budget for the entire nursing
25 department, work with the president and executive staff of the

Caf4mar2

Graham - direct

1 hospital to make sure we were taking good care of our patients,
2 and I also had report to the board of trustees.

3 Q. For about how long did you remain in the director of
4 nursing position?

5 A. For approximately three years.

6 Q. Did you have a next position at St. Barnabas?

7 A. Yes.

8 Q. What was that?

9 A. I became senior vice president and director of nursing.

10 Q. When you became senior vice president and director of
11 nursing did your responsibilities change?

12 A. Yes, because I also was given other units to be responsible
13 for, other services.

14 Q. What is other units and services?

15 A. I have given environmental services which covers
16 housekeeping, laundry and gardens and grounds; in addition, I
17 was given cardiopulmonary which is respiratory therapy, and
18 cardiac therapy.

19 Q. Generally what other responsibilities did you have then for
20 these other units or departments?

21 A. Pretty much the same, to assist with retention of those
22 employees, to do their budgets; that's pretty much the same as
23 I did for the nursing department.

24 Q. How long did you remain in the senior vice president and
25 director of nursing position?

Caf4mar2

Graham - direct

1 A. Up until about a year, year and a half, two years ago.

2 Q. What did your position then become at that time?

3 A. I then became senior vice president of operations.

4 Q. What were your responsibilities in that role?

5 A. I took over different departments and then no longer
6 oversaw nursing, so, about a year and a half to two years ago I
7 was given other departments such as the pharmacy, the
8 laboratory, nutrition services, physical therapy and
9 occupational therapy, and I still retained housekeeping
10 cardiopulmonary.

11 Q. Is that your current role?

12 A. Yes, that's my current role.

13 Q. I want to go back in time to when you had recruiting
14 responsibilities and I think you had said then you had
15 recruiting responsibilities locally and abroad. What do you
16 mean by that?

17 A. When I took the position as nurse recruiter, I was given an
18 orientation by the previous recruiter who was retiring. She
19 taught me how to do local recruitment, what credentials I would
20 have to look for in nurses, and then St. Barnabas at that time
21 in 1990 had contracted with two different agencies to recruit
22 nurses from overseas.

23 Q. Did St. Barnabas at that time recruit nurses from
24 Philippines?

25 A. Yes, they did.

Caf4mar2

Graham - direct

1 Q. Why was that?

2 A. First of all, they were available; second of all, the
3 educational background qualified them to sit for the New York
4 State licensure exam.

5 Q. You also mentioned you were recruiting locally; why were
6 you recruiting in the Philippines when you were recruiting
7 locally?

8 A. Because we had many, many vacancies that we could not fill
9 through local recruitment. We were not getting enough
10 applicants or we weren't getting appropriately qualified
11 applicants.

12 Q. When you say recruiting locally geographically what do you
13 mean by that?

14 A. Locally means in the metropolitan area, including New
15 Jersey, Connecticut, and locally I guess it's not local but
16 closer than the Philippines, I even went as far as Canada to
17 recruit nurses to fill our vacancies.

18 Q. Did you recruit in New York?

19 A. Surely, yes.

20 Q. Where geographically within New York?

21 A. All the boroughs of New York. I went to Connecticut,
22 University of Connecticut, I would go to career days, job
23 fairs, mostly recruiting from schools and job fairs and
24 advertising.

25 Q. Did you have in your various roles the opportunity to work

Caf4mar2

Graham - direct

1 with Marlen Martinez?

2 A. If you mean work with, she was one of my staff nurses when
3 I was director of nursing.

4 Q. When you were director of nursing about how many staff
5 nurses did you have?

6 A. About 240.

7 Q. How would you describe your relationship with Ms. Martinez?

8 A. Good, positive.

9 Q. Why do you say that?

10 A. Number 1, she was a very good nurse; number 2, I enjoyed
11 speaking with her, and she would tell me some things about
12 herself, related to her work or related to her family. I liked
13 her.

14 Q. When she talked to you about things -- where was it that
15 you would talk to her in the hospital?

16 A. Various places. I have what they call an open door policy.
17 My office was on the 6th floor. Across the hall from my office
18 was the payroll department. Quite often if nursing staff had
19 questions about their paychecks, they would come up to the
20 payroll office, and a lot of times they would stop by my office
21 to chat. I was also very visible on the nursing units and so I
22 would make rounds quite often and whatever area Marlen was
23 working, I would see her and chat with her.

24 Q. What sorts of things did you chat about with her when you
25 would see her?

Caf4mar2

Graham - direct

1 A. Sometimes she would be working in units that was not her
2 regular unit so we would talk about the fact that she got
3 floated. Sometimes she would tell me about the health of her
4 father. She was also completing her master's degree and we
5 would chat about that.

6 Q. When you say you chatted with here about getting floated,
7 what did she say to you and what did you say to her?

8 A. Well, her home unit was the intensive care unit. Quite
9 often I would see her working in the emergency department which
10 she was qualified to do. Actually I was thankful to see her
11 there because she always seemed to have a very positive
12 attitude even though she was floating.

13 Q. Did you know why she was floating?

14 A. The reason usual reason for floating nurses is that there
15 is a hole shall we say where we need an additional, there are
16 not enough nurses on a specific unit or because of operational
17 reasons or clinical reasons, you need an additional nurse, so
18 then you would float a nurse who was not regularly scheduled to
19 work there but was competent to work in that area.

20 Q. Was Ms. Martinez a member of a union?

21 A. Yes, she was a member of 1199.

22 Q. What if anything did her membership in the union have to do
23 with where she would be assigned whether she was floating?

24 A. Sometimes floating had to do with seniority.

25 Q. Explain what you mean by that.

Caf4mar2

Graham - direct

1 A. If two nurses had like training and like competency and we
2 needed one nurse to float and neither wanted to volunteer, then
3 it would be the nurse with the least seniority who would float.

4 Q. Why?

5 A. That was written within their contract.

6 Q. The union contract?

7 A. The union contract, yes.

8 Q. During the time that you were senior vice president with
9 responsibility for the nurses, did you have some familiarity
10 with the hospital's medication error policy?

11 A. Yes.

12 Q. You have a black notebook in front of you. I would like to
13 ask you to turn to Defendant Exhibit 2, tab 2, DX 2. That's a
14 copy of the hospital's medication error policy?

15 A. Yes, it is.

16 Q. Explain to the jury generally what the policy provided,
17 what the medication error policy provided?

18 A. It provided guidelines that in the event that an error was
19 made, what steps should be taken.

20 Q. In the event an error was made, what steps should be taken
21 and by whom?

22 A. If an individual either made a medication error that they
23 were aware of or witnessed a medication error, then the first
24 thing they should do is assess the patient, the second thing
25 they should do is notify the physician, and the third thing

Caf4mar2

Graham - direct

1 they should do is notify their superior.

2 Q. Let's look at the policy itself, Defendant Exhibit 2. Do
3 you see the very first paragraph says the policy is as follows;
4 all medication errors shall be identified, reported and
5 corrected immediately to prevent any adverse patient outcome?

6 A. Correct.

7 Q. Then section A there is a definition of medication error;
8 section A is definition of medication error?

9 A. Yes.

10 Q. There is this whole, 17 numbers that follow under the
11 medication error section?

12 A. Correct.

13 Q. Coming down to number 9, one of those errors would be the
14 wrong medication or solution?

15 A. Correct.

16 Q. The next number 10 would be an unordered medication or
17 solution?

18 A. Correct.

19 Q. Then next section, section B, has the heading reporting of
20 medication error?

21 A. Yes.

22 Q. In that section it describes what the nurse should do when
23 there is a medication error?

24 A. Correct.

25 Q. What was the underlying reason or policy for the hospital

Caf4mar2

Graham - direct

1 wanting nurses to report medication errors?

2 A. To protect the patient.

3 Q. By reporting the error how could the patient be protected?

4 A. By being clinically assessed by the physician.

5 Q. I want to turn attention to September 14, 2009. On that
6 day did you become aware that there was apparently some
7 morphine missing from the ICU?

8 A. Yes.

9 Q. How did you become aware of that?

10 A. I was called by Norma Ondoy, my evening nurse and
11 supervisor, that the narcotics count was not correct.

12 Q. Did you learn anything else that evening about the
13 apparently missing morphine?

14 A. I don't know what you mean.

15 Q. Aside from, did you learn anything else from speaking with
16 Ms. Ondoy that evening about the apparently missing morphine?

17 A. Yes.

18 Q. What did you learn that evening, still on the 14th?

19 A. Apparently a nurse had a STAT order for morphine for her
20 patient, and when she went to the narcotics box and opened the
21 narcotics box, she immediately thought something was wrong,
22 because she could see that a previous number of morphine -- let
23 me back up. She went to take the morphine out and noticed that
24 no morphine had been signed out on the narcotics sheet but the
25 count was different than before.

Caf4mar2

Graham - direct

1 Q. What if anything did you do that evening when you learned
2 that information?

3 A. I asked Norma Ondoy to, first of all, they held all the
4 nurses in the ICU until they could figure out whether somebody
5 had given it and forgotten to sign it out. They had already
6 done that. Every nurse had said they had not taken out the
7 morphine, so we asked for statements from the nurses that were
8 working in that particular district where the narcotics were
9 missing.

10 Q. Was there anything else you did that evening after learning
11 about what you described?

12 A. Norma Ondoy also told me that in the medication room, when
13 you give an injection you have to dispose of a syringe, or in
14 this instance it's called a tubex, a glass tube with medication
15 in it with a needle on the end. The normal way to discard of
16 that is to put in what they call a sharps container, a
17 container that's locked, so that if you put something in you
18 can't take it out. When Norma and one of the nurses checked
19 the medication cart there was a paper bag there for disposal of
20 waste, and when they went through the paper bag, they found
21 three empty morphine tubexes, and also an empty saline tubex.

22 Q. Turn to Defendant Exhibit 8, tab 8 in the binder. Is that
23 a copy of a memo that you received from Ms. Ondoy describing
24 what she had done on the evening of the 14th?

25 A. Yes.

Caf4mar2

Graham - direct

1 Q. When did you get that memo from her, do you remember?

2 A. The next morning.

3 Q. That would have been 15 September?

4 A. Correct.

5 Q. Turn to the second page of Defendant Exhibit 8, there is a
6 document called controlled drug shortage investigation form.

7 Was that something you saw on September 15?

8 A. Yes.

9 Q. How did you receive that?

10 A. Norma Ondoy had left it on a table in my office.

11 Q. Did she also leave in your office the written statements of
12 the nurses you referred to?

13 A. Yes.

14 Q. Let me ask you to turn to tab 9, Exhibit 9, Defendant
15 Exhibit 9, is that one of the statements that was left on your
16 table?

17 A. Yes.

18 Q. Turn to Defendant Exhibit 10; is that one of the statements
19 that was left on your table?

20 A. Yes.

21 Q. Jump all the way to Defendant Exhibit 26, was that one of
22 the statements left on your table?

23 A. Yes.

24 Q. Turn to Defendant Exhibit 27; was that one of the
25 statements left on your table?

Caf4mar2

Graham - direct

1 A. Yes.

2 Q. Please turn to Defendant Exhibit 28; was that one of the
3 statements left on your table?

4 A. Yes.

5 Q. Turn to Defendant Exhibit 29; was that one of the
6 statements left on your table?

7 A. Yes.

8 Q. Focusing on after you came in on the 15th, you received the
9 memo, the statements and the controlled drug shortage
10 investigation form from Ms. Ondoy, what if anything did you do
11 that day regarding the apparently missing morphine?

12 A. I did quite a few things actually. I called in the nurse
13 manager for the unit, Pauline Lattery, the nurse patient care
14 coordinator assigned to ICU Agnes Lucero. The previous evening
15 when the narcotics were found missing, the pharmacy had also
16 been notified. The associate director of the pharmacy at the
17 time was Patricia Byrne. We involved her also in helping us
18 complete an investigation.

19 Q. As the day went forward on the 15th, what did you learn
20 about the investigation if anything?

21 A. It seemed, I guess we have to go back. It seemed that
22 there was a patient in the ICU who was under the care of Marlen
23 who had to go for a test and eventually the test ended up being
24 canceled because the patient's condition changed. I found out
25 about that that morning.

Caf4mar2

Graham - direct

1 Q. What else did you find out during the course of the 15th
2 about the apparently missing morphine in the ICU district 3?

3 A. That there was a concern that one of the patients under
4 Marlen's care, the condition had changed and it was determined
5 at that time, considering there were was missing morphine and
6 the patient's condition changed, that the physician decided to
7 ask for a urine specimen from the patient.

8 Q. On the 15th did you learn about the results of that test?

9 A. Yes.

10 Q. What did you learn?

11 A. The patient's urine was positive for morphine.

12 Q. What else if anything did you do that day regarding
13 Ms. Martinez?

14 A. Ms. Martinez and another nurse was suspended indefinitely,
15 pending completion of the investigation.

16 THE COURT: I need you to speak up a little bit.

17 Q. Who was other the nurse?

18 (Pause)

19 Q. I think I was asking about the other nurse; who was the
20 other nurse?

21 A. Cora Fischer.

22 Q. What if anything did Cora Fischer have do with what you
23 were doing that day?

24 A. Well, it appeared that Cora Fischer lied, and the previous,
25 when they were starting the investigation the evening before,

Caf4mar2

Graham - direct

1 they noted on the narcotics sheet that there appeared to be a
2 change of an entry. Cora Fischer admitted that she changed
3 that entry.

4 Q. Why do you say that it appeared that Cora Fischer lied?

5 A. Well, let's back up. Cora Fischer was suspended because
6 she, OK, when you are going to medicate a patient, you should
7 only remove the medication at the time that you are going to
8 medicate a patient, particularly a narcotic. Cora had taken
9 narcotics out of the narcotics box prior to the scheduled time
10 that she was going to give it, and that's not a practice that
11 should be performed.

12 Q. So Ms. Fischer was suspended?

13 A. Yes.

14 Q. Go to Defendant Exhibit 17 in that black binder; is that a
15 copy of the suspension notice for Ms. Fischer?

16 A. Yes.

17 Q. Does your signature appear on that page?

18 A. Yes, where it says signature of department head.

19 Q. Above your signature whose signature is that?

20 A. Pauline Lattery, nurse manager of ICU.

21 Q. To the right of her signature, that is Ms. Lattery's
22 signature, there is a date; whose handwriting is that?

23 A. Pauline Lattery's.

24 Q. Beneath Pauline Lattery is your signature?

25 A. Yes.

Caf4mar2

Graham - direct

1 Q. To the right of your signature, I don't see a date; do you
2 recall when you signed that?

3 A. It was on the 15th, the morning of the 15th.

4 Q. Do you recall when -- let me back up. How did it come
5 about that Ms. Fischer was suspended; who made that decision?

6 A. I did.

7 Q. Why did you make that decision?

8 A. Until you can complete an investigation and be assured, to
9 keep patients safe until we completed investigation, I didn't
10 want anybody who I thought was involved taking care of patients
11 until we figured out exactly what happened.

12 Q. Do you recall when during the day on the 15th, you
13 described a number of things that were going on during the
14 course of that day, that you directed that Ms. Fischer be
15 suspended?

16 A. Do I remember exactly when, no, I don't.

17 Q. Beginning, end, middle of the day, end of the day, when
18 during the day?

19 A. I don't recall.

20 Q. Did you direct that anybody else be suspended that day?

21 A. Yes, Marlen Martinez.

22 Q. Why did you direct that Ms. Martinez be suspended that day?

23 A. Because she was drawing narcotics from the narcotics box,
24 the same narcotics box.

25 Q. Directing your attention to Defendant Exhibit 15, is that a

Caf4mar2

Graham - direct

1 copy of the suspension notice you signed for Ms. Martinez?

2 A. Yes.

3 Q. Before you signed it did you read the detail section?

4 A. Yes.

5 Q. What did the detail section say?

6 A. Suspended indefinitely pending investigation, conflicting
7 story, stated that she changed the time on a narcotics sheet;
8 second, there is evidence of positive opiates in patient in
9 527A, who was under her care; third, that the scheduled
10 procedure for the patient was not done, the patient's blood
11 pressure had dropped to 80 over 40, please see attached.

12 Q. I want to go back and forth between Defendant Exhibit 15
13 and Defendant Exhibit 17. Go back to 17 for the moment; did
14 you read the detail section of that suspension notice before
15 you signed it?

16 A. Yes.

17 Q. What did that detail section say?

18 A. (1) conflicting story: (2) not telling the truth, stated
19 that she was the one who changed the time on the drug
20 disposition record and 24-hour nursing order form, please see
21 enclosed.

22 Q. If you look at Defendant Exhibit 15 and Defendant Exhibit
23 17, they both start out with the words conflicting story. As
24 you sit here now do you recall what that conflicting story was?

25 A. Yes.

Caf4mar2

Graham - direct

1 Q. What was it?

2 A. As I stated before, it was noted on a narcotics sheet that
3 an entry, specifically a time had been changed. At one point
4 Cora Fischer admitted that she changed the time; then at the
5 same time Marlen Martinez admitted that she changed the time.

6 Q. So following the issuance of the suspension notices,
7 suspensions pending investigation, what if anything did you do
8 further to investigate?

9 A. Well, I asked for the nurses involved to come in and see
10 me; I wanted to speak to them.

11 Q. Which nurses involved?

12 A. Cora Fischer and Marlen Martinez.

13 Q. Did either one of them come in?

14 A. Cora Fischer came in.

15 Q. When she came in did you speak with her?

16 A. I did.

17 Q. What did you say to her and what did she say to you?

18 A. I asked her whether or not she had changed the entry on the
19 narcotics sheet. She said no, she had not. When I asked her
20 why did she lie and say that she had changed the entry, she
21 said she was afraid because she thought she would get in
22 trouble because she had removed the narcotics prior to the time
23 that she was going to use them.

24 Q. What did you say in response to that?

25 A. Well, I told her, yes, she did do something she shouldn't

Caf4mar2

Graham - direct

1 have, but she also should not have lied and said that she
2 changed the entry time on the narcotics sheet.

3 Q. What if anything did you do then regarding her suspension?

4 A. She was, she had representation with her, which was a union
5 delegate. I asked Cora to step outside. I spoke with the
6 union delegate. I told them that Cora still had to have some
7 sort of discipline related to the fact that she lied in the
8 middle of this investigation. So, we reduced the suspension to
9 a, we made the suspension a 3-day suspension, and then
10 scheduled her to come back on duty.

11 Q. Did Ms. Martinez respond to you following her suspension
12 and come in and speak with you?

13 A. No.

14 Q. What if anything did you or your office do to try to speak
15 with her while she was out on suspension?

16 A. We placed phone calls to phone numbers we had listed for
17 her. We did not get a response. I sent a letter to her home
18 address, the address that we had. I did not get response. So
19 I did reached out to her union delegate Lisa Greene to see
20 whether Lisa could get her to respond and come in an see me.

21 Q. Why did you want to see Ms. Martinez?

22 A. I wanted to speak to her and have her tell me in her own
23 words what happened that night. Quite often when people give a
24 written statement, they don't always include every detail. The
25 other thing is when you meet with somebody, face-to-face, you

Caf4mar2

Graham - direct

1 can ask them whether there was some extenuating circumstance,
2 was there something going on, and actually see their emotional
3 state. So I wanted to speak to Marlen.

4 Q. Did you hear from her?

5 A. I did not.

6 Q. Directing your attention Defendant Exhibit 19, you
7 mentioned that you sent a letter to Ms. Martinez while she was
8 out on suspension, is this a copy of that letter?

9 A. Yes.

10 Q. There aren't any c.c.s on this letter; is there any reason
11 did you not c.c. anybody from her union on that letter?

12 A. Because I was already in communication with them verbally.

13 Q. Who specifically at the union were you speaking with?

14 A. Lisa Greene, who is a delegate and also had the title of
15 contract administrator, and then Nadine, the last name escapes
16 me, she was the organizer for 1199, RN organizer.

17 Q. You put a phone number in your letter to Ms. Martinez;
18 whose phone number was that?

19 A. My phone number, my office phone number.

20 Q. After you sent this letter to Ms. Martinez, did she call
21 you?

22 A. No.

23 Q. Did you hear directly from her?

24 A. No.

25 Q. What if anything did you decide to do when you didn't hear

Caf4mar2

Graham - direct

1 from her?

2 A. I followed up with Lisa Greene again and asked her whether
3 she had gotten in touch with her. She said that she was not
4 getting responses from Marlen. Lisa then reached out to Nadine
5 at 1199, and I had spoken to both of them regarding how many
6 efforts they had made to speak to Marlen. Lisa Greene came to
7 my office. She verbalized not understanding why Marlen would
8 not want to respond and come in and speak to me. So
9 eventually, I went ahead and terminated Marlen.

10 Q. Directing your attention to Defendant Exhibit 20, is that a
11 copy of the letter terminating Ms. Martinez's employment?

12 A. Yes.

13 Q. Did you have to take any steps along the way, provide some
14 lesser discipline, or were you permitted to go straight to
15 termination; in other words, did you have authority to
16 terminate her employment under these circumstances?

17 A. Yes.

18 MR. GARLAND: If I might confer, your Honor, I might
19 be done.

20 (Pause)

21 MR. GARLAND: No further questions, your Honor.

22 THE COURT: Cross.

23 CROSS EXAMINATION

24 BY MR. NUWESRA:

25 Q. You testified during direct a few minutes ago that you

Caf4mar2

Graham - cross

1 sought the assistance of the union after, to make contact with
2 my client after you sent a letter; do you recall that
3 testimony, yes or no, do you recall that testimony?

4 THE COURT: Read the question back.

5 (Record read)

6 A. Yes.

7 Q. Look at Exhibit 19 that's in front of you. This is the
8 letter you were referring to?

9 A. Yes.

10 THE COURT: Plaintiff exhibit or defendant exhibit.

11 MR. NUWESRA: This is a defendant exhibit.

12 THE COURT: Thank you.

13 You need to clarify that for the record.

14 (Continued on next page
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CAFBMAR3

Graham - cross

1 Q. Now, Ms. Graham, how did you learn that Patient N was
2 positive for Morphine?

3 A. Pauline Frances-Lattery, the nurse manager, told me.

4 Q. Before signing off on this, on the suspension letter, which
5 is Defendant's Exhibit 15-- you can take a look at it. Before
6 signing off on that, did you do anything to personally
7 investigate the circumstances besides what you were told about
8 it?

9 A. I don't understand the question.

10 Q. Well, I believe you testified that you signed off on this
11 letter on the morning of the 15th of September, 2009. Do you
12 recall that testimony?

13 A. Yes.

14 Q. My question to you: Prior to signing off on that letter,
15 did you personally do anything to investigate what happened?

16 A. Yes.

17 Q. What did you do?

18 A. Well, it started the evening before, when the nursing
19 supervisor called me and started telling me the details related
20 to missing narcotics.

21 I then, the next morning, reviewed the statements that
22 were on my table in my office and then met with the nurse
23 manager, the patient care coordinator, and Patty Byrne, the
24 associate director of the pharmacy, in seeking assistance in
25 getting all the facts together.

CAFBMAR3

Graham - cross

1 Q. Okay. So you basic-- would it be fair to state that you
2 basically talked to the investigating committee, instructed
3 them as to what they should do, and exchanged ideas? Right?

4 A. Yes.

5 Q. Did you personally meet with any of the nurses that were
6 involved with the missing Morphine the night before?

7 A. Not to my knowledge.

8 Q. Did you talk to my client prior to signing off on that
9 suspension letter?

10 A. Not to my knowledge.

11 Q. Then would it be fair to state that at the time that you
12 signed off on the suspension letter, the only information you
13 had was what Ms. Ondoy and Ms. Lattery told you?

14 A. Correct.

15 Q. Now, how did you learn, ma'am, that there was a change in
16 Patient N's condition on the 14th of September?

17 A. Pauline Frances-Lattery told me the morning of the 15th.

18 Q. Okay. Did you do anything to double-check those statements
19 of Ms. Lattery?

20 A. No.

21 Q. Were you privy to the chart of the patient at the time?

22 A. I could have looked at the chart, yes.

23 Q. But you didn't?

24 A. I did not.

25 Q. Now, you testified-- withdrawn.

CAFBMAR3

Graham - cross

1 Isn't it a fact, ma'am, that you never personally
2 reached to the phone to contact my client personally; it was
3 your staff members who told you that they did it?

4 A. Correct.

5 Q. Would you please take a look in the blue folder, the blue
6 one which is Plaintiff's Exhibits, and take a look at the tab
7 that says number 2, or marked as 2? And let me know when you
8 have finished reviewing that document, please, and it's
9 double-sided.

10 A. Okay.

11 Q. Did there ever come a time during my client's suspension
12 where you learned that she had hired her own private attorney
13 to communicate with the hospital on her behalf?

14 A. The only thing I was told was that she was speaking with an
15 attorney.

16 Q. And who was it that told you that?

17 A. I'm not quite sure. I'm not quite sure.

18 Q. Was it another manager at St. Barnabas?

19 A. I don't want to guess.

20 THE COURT: Excellent.

21 Q. Was it Mr. Keith Wolf?

22 A. To my knowledge, no, it wasn't Keith.

23 Q. Was it Mr. Marc Wolf?

24 A. I would be guessing, but I believe not, no.

25 Q. And just for the record, who is Mr. Marc Wolf?

CAFBMAR3

Graham - cross

1 A. Mr. Marc Wolf is the director of human resources.

2 Q. And that is the gentleman that sent out the termination
3 letter on behalf of the hospital to my client? I believe it's
4 DX No. 20 in the black one.

5 THE COURT: Did Mr. Marc Wolf sign the termination
6 letter that was sent to plaintiff here?

7 THE WITNESS: Yes. Yes.

8 THE COURT: Thank you.

9 Q. Now, when Ms. Cora Fischer had told you that she had lied
10 about the change in the narcotics sheet, did you then have
11 reason to believe that my client, Ms. Martinez, was therefore
12 telling the truth?

13 A. No.

14 Q. Now, with regard to the medication error policy of
15 St. Barnabas, would it be fair to state that all of the nurses
16 that had been under your jurisdiction in your capacity as the
17 senior vice president of nursing were aware of it?

18 A. Yes.

19 Q. And would it then be fair to state that my client, who had
20 been under your jurisdiction, would have also been aware of
21 that?

22 A. Yes.

23 Q. And is it a fair characterization that your medication
24 error policy is designed to be nonpunitive?

25 A. Correct.

CAFBMAR3

Graham - cross

1 Q. During direct examination, you mentioned that Ms. Norma
2 Ondoy relayed to you that in the nonhazardous waste bag, in the
3 regular trash bag or garbage bag, that there were three empty
4 Morphine Tubexes.

5 Do you recall that testimony?

6 A. Yes.

7 Q. Would you please tell me what else she told you there was
8 there? Because I did not hear you.

9 A. A saline Tubex.

10 Q. Saline.

11 Were you aware at the time that the only person that
12 administered any Morphine in D3 was Ms. Libiran?

13 A. I know that --

14 MR. GARLAND: Objection. Can I hear that again,
15 please? Can I hear the question again, please? I didn't hear
16 the question.

17 THE COURT: Would you read back the question, please.

18 (Record read)

19 MR. GARLAND: Thank you.

20 MR. NUWESRA: There's an objection.

21 MR. GARLAND: No, I just wanted to --

22 THE COURT: No, he just wanted to hear the question.

23 MR. NUWESRA: Thank you.

24 THE COURT: Were you aware of that?

25 A. I know that Ms. Libiran gave Morphine.

CAFBMAR3

Graham - cross

1 Q. Okay. And what-- why it is a no-no, for lack of a better
2 word, for nurses to leave the empty Morphine Tubexes in the
3 regular garbage bag rather than in the hazardous waste bag?

4 A. Because somebody could accidentally get stuck by a needle.

5 Q. So that I can understand, you mean to tell me that the
6 empty-- the Tubexes, the Morphine Tubexes, actually have
7 needles in them?

8 A. Correct.

9 Q. And would it also be against hospital policy or practice to
10 just leave those empty Morphine Tubexes on the medication cart
11 without disposing of them either in the hazardous waste or in
12 the regular garbage bag after administering them, after giving
13 the shot to the patient?

14 A. The nurses are trained that the proper disposal of a needle
15 and syringe is in a sharps container, which is hazardous waste.

16 Q. And if a certain nurse does not abide by that policy or
17 practice, is she or she subject to discipline?

18 A. Possibly.

19 Q. Under what circumstances would you think that those nurses
20 shouldn't be subject to discipline?

21 A. Could you ask that again, please?

22 Q. In those scenarios, where they would leave-- those nurses
23 that would leave the empty Tubex-- empty Morphine Tubexes on
24 either the medication cart or in the regular garbage bag, under
25 what circumstances would the hospital not discipline them for

CAFBMAR3

Graham - cross

1 doing that?

2 A. I don't know. I've never had that issue, so I'm not going
3 to make up an answer.

4 Q. Okay. Fair enough.

5 Did there ever come a time between 2008 and the time
6 that you terminated my client-- initially suspended her, which
7 is September of 2009, where you told Ms. Lattery or anybody
8 else in the I.C.U. that my client does not qualify to be a
9 charge nurse?

10 A. Did I ever say that?

11 Q. Yes.

12 A. No.

13 Q. During-- based on your observation and knowledge of my
14 client during her tenure at St. Barnabas, do you think-- or did
15 you think that she would make a good charge nurse?

16 A. Yes. She was a very good nurse.

17 Q. Since joining St. Barnabas in the variety of positions that
18 you held, did there ever come a time where you learned of the
19 term "progressive discipline"?

20 A. Yes.

21 Q. What is progressive discipline?

22 A. Progressive discipline is when you put an employee on
23 notice -- usually first verbally and then, second, written --
24 then with progressive suspensions and then possibly
25 termination.

CAFBMAR3

Graham - cross

1 Q. Ms. Graham, is it a fact that my client was never -- during
2 her tenure prior to the 14th of September, 2009, she was never
3 disciplined for misadministering-- misadministering any kind of
4 narcotics?

5 A. That, I can't answer. I don't have her folder.

6 Q. Let me ask you this: Had Ms. Martinez contacted you prior
7 to her termination, would you have taken her back?

8 A. I can't answer that because it didn't happen.

9 MR. NUWESRA: Okay. Give me a minute, your Honor, to
10 check with my client.

11 THE COURT: Certainly.

12 MR. NUWESRA: Thank you.

13 (Pause)

14 MR. NUWESRA: I have no other questions, your Honor.

15 THE COURT: Any redirect?

16 MR. GARLAND: Just very briefly, your Honor. Very
17 brief.

18 REDIRECT EXAMINATION

19 BY MR. GARLAND:

20 Q. On the subject of charge nurses, do you have a recollection
21 one way or another whether or not Ms. Martinez ever worked as a
22 charge nurse?

23 A. I believe she did. I can't say exactly yes, but I believe
24 she did.

25 Q. Do you have a recollection one way or another --

CAFBMAR3

Graham - redirect

1 MR. NUWESRA: Objection, your Honor. Asked and
2 answered.

3 THE COURT: The objection is overruled.

4 Q. Do you have a recollection one way or another whether or
5 not the process by which charge nurses were selected changed in
6 the period between 2002 and 2009?

7 A. I don't believe so, no.

8 MR. GARLAND: No further questions, your Honor.

9 MR. NUWESRA: No recross, your Honor.

10 THE COURT: Thank you, ma'am. You're done.

11 THE WITNESS: Thank you.

12 (Witness excused)

13 MR. GARLAND: The defendant rests.

14 THE COURT: The defendant rests.

15 Are there rebuttal witnesses for the plaintiff?

16 MR. NUWESRA: Can I just confer with my client about
17 possible rebuttal?

18 THE COURT: Yes.

19 (Pause)

20 MR. NUWESRA: Your Honor, I respectfully ask that I
21 recall my client for rebuttal purposes. It shouldn't take more
22 than five to ten minutes at the most.

23 THE COURT: Okay. Ms. Martinez, would you come back?
24 You're under oath.

25 Rebuttal testimony will be limited to specific areas

CAFBMAR3

Graham - redirect

1 that were only covered on the defendant's case. We will not
2 have any reiteration of previously given testimony.

3 THE COURT: Have a seat.

4 THE WITNESS: Thank you.

5 MARLEN MARTINEZ, recalled.

6 REDIRECT EXAMINATION

7 BY MR. NUWESRA:

8 Q. Good morning, Ms. Martinez.

9 A. Good morning, Mr. Nuwesra.

10 Q. I just want to ask you a few questions with regard to
11 certain testimonies that were given this morning by Ms. Lattery
12 and Ms. Graham. You heard Ms. Graham and Ms. Lattery
13 testifying under oath that between the 14th of September and
14 the 15th of September, Patient N's condition changed.

15 Do you recall their testimony?

16 A. Yes.

17 Q. With regard to your knowledge, did Patient N's condition
18 change between September 14 and September 15th, before you were
19 suspended?

20 MR. GARLAND: Your Honor, I think that was covered in
21 plaintiff's direct testimony earlier.

22 THE COURT: It was. It's not proper rebuttal. I
23 mean, she doesn't get to come up here and say it again. If
24 there's a new point she did not cover on her direct testimony,
25 you are welcome to cover it. This is not to reemphasize the

CAFBMAR3

Martinez - redirect

1 old.

2 MR. NUWESRA: There is, your Honor, if I'm allowed.

3 A. No, the patient's condition did not change.

4 Q. Based on your caring for Patient N, did there ever come a
5 time prior to your suspension where her blood pressure was low
6 on the 15th of September?

7 MR. GARLAND: Objection.

8 THE COURT: The objection is-- this is not proper
9 rebuttal testimony.

10 I'll tell you what. You go take-- I hate to do this,
11 because I'm going to make you take two breaks. But go take a
12 five-minute break so I can talk to him about what it is he's
13 going to do. Don't discuss the case. Keep an open mind.

14 (Jury excused)

15 (Continued on next page)

CAFBMAR3

Martinez - redirect

1 (In open court; jury not present)

2 THE COURT: Okay. I want a proffer. So ask the
3 questions you want to ask.

4 MR. NUWESRA: Okay. No problem.

5 Ms. Martinez, when you had the opportunity to review
6 Patient N's chart in response to her mom's inquiry, was there
7 anything with regard to her condition that was different than
8 on the 14th of September?

9 THE WITNESS: Patient N needed to go in isolation, so
10 therefore the doctor decided to move her into District 1
11 because that's the only district that provided isolation for
12 the patient. They were ruling out meningitis, which is
13 contagious by droplets.

14 MR. NUWESRA: Now, you heard testimony from
15 Ms. Lattery and Ms. Graham that Patient N's MRI wasn't-- didn't
16 go forward because her condition has changed vis-a-vis the
17 restlessness and the low blood pressure.

18 Do you recall that?

19 THE WITNESS: Yes.

20 MR. NUWESRA: Based on your review of Patient N
21 September 15, 2009, was she restless and/or did her low blood
22 pressure fall?

23 THE WITNESS: Patient N continued to be restless. And
24 I know that they had given her Ativan, 8 milligrams, like
25 around 10:00, and her pressure had subsequently dropped also

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1 from baseline at that time.

2 MR. NUWESRA: And was she under your care on the 15th?

3 THE WITNESS: She was under Cora Fischer's care. No,
4 she was not under my care.

5 MR. NUWESRA: And when you took over the care of
6 Patient N on the 14th of September, 2009, around 1:30 or so
7 p.m., did you review her chart?

8 THE WITNESS: Yes, I did.

9 MR. NUWESRA: Was there anything significantly
10 different with regard to her condition prior to her arriving at
11 your unit?

12 THE WITNESS: No. She was restless and agitated on
13 the unit, and they wanted to keep a closer eye on her. Because
14 on the unit, you're monitoring the patient's vitals every
15 shift, which is like every seven hours. Because on the unit
16 it's not 12 hours like I.C.U. So therefore they wanted closer
17 monitoring, so they transferred her to telemetry for every
18 four-hour monitoring as opposed to every eight-hour monitoring.

19 MR. NUWESRA: And that's exactly why I wanted her
20 testimony, your Honor. I did not want the jury to be left with
21 the impression that Patient N -- in fact, Patient N's condition
22 in fact did change.

23 MR. GARLAND: Your Honor, I think a lot of this was
24 covered already in the direct case. I don't understand how
25 this is proper rebuttal. It's been covered.

1 THE COURT: I disagree with you that all of it has
2 been covered. So limit it to those questions, I'll allow it,
3 and then you're free to recross her.

4 MR. NUWESRA: Thank you, your Honor.

5 THE COURT: You can go back and get the jury.

6 My personal understanding, listening to the evidence,
7 of how the patient's condition changed is because the patient's
8 condition changed because the patient's blood pressure dropped,
9 but that's maybe not what these medical people were saying.

10 (Continued on next page)

1 (In open court; jury present)

2 THE COURT: Okay. Have a seat. So we're going to
3 allow some limited questioning. I listened to questions and
4 decided that I'm going to allow some limited questioning on
5 rebuttal.

6 MR. NUWESRA: May I, your Honor?

7 THE COURT: Yes.

8 BY MR. NUWESRA:

9 Q. Ms. Martinez, you heard testimony from Ms. Lattery and
10 Ms. Graham that the reason Patient N couldn't do the MRI is
11 because her condition had gotten worse.

12 Do you recall that testimony? Yes or no.

13 A. Yes.

14 Q. Based on your review of Patient N's chart for the 15th of
15 September, 2009, what was her condition with regard to the
16 symptoms for the physical-- the physical symptoms that she
17 presented while under the care of Ms. Fischer?

18 A. Patient N remained restless; she continued to be agitated.
19 And the reason she was moved into District 1 was because they
20 were ruling out meningitis. And District 3 is a two-bedded
21 room, so she needed to go in isolation. However, her condition
22 remained the same. She was still restless.

23 Subsequently, because she was still restless, they
24 gave her Ativan, 8 milligrams, in District 1, after she got to
25 District 1 area under Ms. Cora Fischer's care, and her blood

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1 pressure also dropped there.

2 Q. Do you recall what it dropped to?

3 A. It dropped to, like, 100/40-something or --

4 THE COURT: Are you now just quoting from her chart,
5 from your review of her chart?

6 THE WITNESS: No, it was like-- MAP. I'm remembering
7 what it dropped to.

8 Q. And this is based on your review of the questions --

9 MR. GARLAND: Objection.

10 THE COURT: The objection is sustained.

11 Were you her caring nurse at that time?

12 THE WITNESS: I was trying to find information from
13 the mother, because the mother approached me before I took her
14 in there.

15 THE COURT: How did you find that information?

16 THE WITNESS: Through the record.

17 THE COURT: Through her chart?

18 THE WITNESS: I took the mother over to the-- yes.

19 MR. NUWESRA: Okay.

20 THE COURT: No. Sorry.

21 MR. NUWESRA: All right.

22 Q. And when you received Patient N at approximately 1:30 on
23 the 14th of September, 2009, did you have the occasion to also
24 review that chart, her chart?

25 A. Yes.

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1 Q. And can you tell the jurors, based on your review of that
2 chart, if Patient N's care-- I'm sorry, Patient N's condition
3 ever changed between the time that she arrived at the hospital
4 on September 11, 19-- 2009, until you received her on September
5 14, 2009? Please tell the jury.

6 MR. GARLAND: Objection.

7 THE COURT: I'm sorry. I don't understand the
8 question.

9 MR. NUWESRA: All right. Let me ask it differently.

10 Q. When you received Patient N on the 14th of September, 2009,
11 was part of your responsibility to review her chart to see why
12 she was there?

13 A. Yes.

14 Q. When you received Patient N, was her condition any
15 different than when you cared for her on the 14th of September,
16 2009, prior to you receiving --

17 MR. GARLAND: Objection.

18 THE COURT: Are you asking whether her review of the
19 chart revealed that her condition prior to Ms. Martinez taking
20 care of her had been different than it was during --

21 MR. NUWESRA: Exactly, your Honor.

22 THE COURT: Okay. That's the question. You looked at
23 her chart as part of it.

24 Did you see anything on the chart that was
25 inconsistent with her condition while she was under your care?

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1 THE WITNESS: No.

2 THE COURT: Thank you.

3 MR. NUWESRA: Thank you. I have no other questions,
4 your Honor.

5 MR. GARLAND: No questions, your Honor.

6 THE COURT: Thank you, ma'am. You may step down.

7 (Witness excused)

8 THE COURT: Plaintiff rests, I take it?

9 MR. NUWESRA: Oh, yes, your Honor. Plaintiff rests.

10 THE COURT: Okay. Folks, here's what we're going to
11 do. The timing is great. I need to let you go for a while
12 because I need to have a chat with the lawyers. I need to have
13 a discussion both about some legal matters that I'm required to
14 discuss out of your hearing, and then I need to have a chat
15 with them about the charge, which I was working on last week
16 and which I sent to them on Friday and which we need to discuss
17 and iron out and nail down before they close. The lawyers are
18 entitled before their closing arguments to know what it is that
19 I'm going to tell you about the law so they can tailor their
20 arguments to that. So that's what I'm going to do.

21 I'm going to give you kind of an extra-long lunch and
22 I'm going to ask you to be back here, ready to go, at 1:45. We
23 will start with the closing arguments. The first closing
24 argument will be given by the defendant, by the hospital, and
25 the second closing argument will be given by Mr. Nuwesra on

1 behalf of the plaintiff.

2 The reason that we do things in that order is that the
3 plaintiff, you will recall, has the burden of proof. So the
4 first voice that you heard was a voice on behalf of the
5 plaintiff; and the last voice you will hear discussing the
6 facts is the voice of the party with the burden of proof, the
7 lawyer representing the plaintiff.

8 At the end of those proceedings, we'll see if there's
9 time left for me to charge today or if I should wait until
10 first thing in the morning to charge you. We'll look at the
11 clock and see what's going on. But have a pleasant lunch. Let
12 me talk with them for the next hour. Don't discuss the case.
13 Keep an open mind. Leave all that stuff in the back room.

14 (Jury excused)

15 THE COURT: Gentlemen, we need to take a five-minute
16 break. Okay. Take five.

17 MR. GARLAND: Thank you, your Honor.

18 (Recess)

19 (Continued on next page)

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1 (In open court; jury not present)

2 THE COURT: Okay. Case on trial continues. The
3 parties are present; the jurors are not present.

4 Any motions at this point? Have a seat, folks.

5 MR. GARLAND: I'd like to make a motion, your Honor,
6 if I may.

7 THE COURT: Yes.

8 MR. GARLAND: Again under Rule 50. Now that the case
9 has been concluded, both plaintiff's case and the defense case,
10 I must say, your Honor, both that -- let's talk about the
11 termination claim, the discrimination claim that her discharge
12 was discriminatory or that her discharge was retaliatory.

13 Let's just start with the discharge of discrimination
14 based upon national origin. Your Honor, I would submit that no
15 reasonable jury could possibly conclude on this record that the
16 fact that the plaintiff was from Honduras originally somehow
17 motivated the discharge. There's absolutely, I would submit--
18 this is an overused term, perhaps, but there's not a scintilla
19 of evidence in this record, it seems to me, your Honor, to
20 support the notion that she was discharged because of her
21 national origin, whether it's under Title VII, New York State
22 Humans Right Law or the city law. The record is totally
23 absent, except for the fact that there were some Filipino
24 nurses in the hospital.

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1 THE COURT: I would agree with you that this is a weak
2 case. It's going to the jury. I think you have very strong
3 arguments on the discharge. It's not bulletproof, so I'm not
4 going to dismiss it.

5 MR. GARLAND: Thank you, your Honor.

6 Just for the record, I don't think there's any
7 evidence in the record as well that any allegedly protected
8 activity brought about the discharge. If I may --

9 THE COURT: And that's the more interesting part of
10 the-- that's the more interesting part of the motion, is
11 whether there's evidence to support a retaliation as opposed to
12 a national origin discrimination claim in terms of discharge.
13 The decision was made by Ms. Graham, and I don't recall hearing
14 any evidence that Ms. Graham was privy to any of the
15 plaintiff's complaints that she had previously made about being
16 discriminated against.

17 MR. NUWESRA: May I? I'm sorry.

18 THE COURT: In a minute you will, yes.

19 I may have missed it.

20 MR. GARLAND: I don't think there's anything there.
21 And even if there was something there, just for the sake of
22 argument, there was nothing to show in this record that that
23 would have motivated her decision. What it shows was she was a
24 senior-level executive in the hospital, information was
25 presented to her, two people were suspended. One responded to

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1 her. She met with her, disciplined her, and brought her back.

2 The other one, the plaintiff herself conceded that,
3 you know, I got that letter, I did get that letter from her,
4 and I didn't call her back. I didn't call her back.

5 I thought it was very telling, the question that
6 plaintiff's counsel asked Ms. Graham today, which is, had she
7 come back-- had she come to meet with you, would you have
8 brought her back? And her answer was, well, I was never
9 presented with that opportunity, so I can't tell you what I
10 would have done. That just reinforces the legitimate business
11 reason here that's been articulated. Nothing is cast out on
12 this.

13 So, again, under all three statutes, I would submit
14 that that claim should be dismissed, your Honor.

15 THE COURT: Okay. I need to-- I want to hear on the
16 retaliation prong of it so I could decide whether to reserve or
17 not on that. I'm not reserving on the discrimination prong.
18 On the retaliation prong, I need to hear what it is that-- what
19 evidence there is that the decision-maker in this instance was
20 aware of the complaints.

21 MR. NUWESRA: I believe that their motion should be
22 denied for two reasons.

23 THE COURT: I asked you a question. Answer my
24 question.

25 MR. NUWESRA: I will, your Honor.

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1 THE COURT: No, no. Answer my question and then you
2 can say whatever you want. But when a judge asks you a
3 question, you answer the question.

4 MR. NUWESRA: Okay.

5 THE COURT: What's the evidence that the
6 decision-maker, the person who decided to fire her, what's the
7 evidence that she was aware of the plaintiff's complaints about
8 discrimination?

9 MR. NUWESRA: My client's testimony, your Honor, not
10 only once, but on both days, she repeated her name. She said
11 that she had complained to her about the -- as the record will
12 indicate, that when Ms. Lattery met with her sometime in
13 September, Ms. Lattery told her that upper management knows and
14 I suggest you speak with Ms. Graham.

15 She spoke with Ms. Graham. She specifically told her
16 that she feels that the Filipinos have been getting
17 preferential treatment. And what is really telling, your
18 Honor, is that Ms. Graham did not deny that today.

19 THE COURT: Okay. I don't know how telling that is,
20 but, okay. I'll deny the motion and I'll let the jury decide
21 it.

22 MR. NUWESRA: Thank you.

23 MR. GARLAND: If I may, too, with the other -- what
24 I'll call the other discrimination claim. Not the discharge,
25 but --

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1 THE COURT: There being a charge nurse getting the
2 good shifts.

3 MR. GARLAND: Right. That was really never
4 articulated clearly other than in general, vague, conclusory
5 allegations. There was never any testimony that there was this
6 particular position at this particular time, that that
7 particular nurse got this and I didn't, nor was there any
8 evidence of any damages presented by plaintiff as to any of
9 these other vague claims. Both --

10 THE COURT: Twenty-three dollars an hour for not being
11 a charge nurse.

12 MR. GARLAND: For what? Over what -- how could the
13 Court then determine, was it one hour? Was it two hours? How
14 many hours would it be? There was no evidence in the record to
15 that.

16 THE COURT: Since the jury is not going to determine
17 that and I am, we're not going to worry about that right now.
18 I'm trying to get a case to the jury.

19 MR. GARLAND: Right. But the other piece -- and it's
20 potentially going to the jury -- is, are there any noneconomic
21 or compensatory damages?

22 THE COURT: Yes, she did testify about noneconomic and
23 compensatory damages and her sister reinforced her testimony.

24 MR. GARLAND: As to the termination, but not as to the
25 other. The testimony to the other was that she loved her job.

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1 There was never any testimony about compensatory damage that
2 related to her not getting --

3 THE COURT: Great. Make that point to the jury when
4 you close.

5 MR. GARLAND: Thank you.

6 THE COURT: Okay. Now, before we turn to the charge,
7 I want there to be a caution to Mr. Nuwesra. I want to clear
8 this up in my own head, but then I want to caution you about
9 something. You have repeatedly made a big deal about the fact
10 that the drug test on Patient N was positive for opiates and
11 not specifically for Morphine.

12 There is no evidence in this record that any other
13 form of narcotic was missing or unaccounted for, and there is
14 no testimony from any witness in this record about a difference
15 between testing positive for opiates and testing positive for
16 Morphine, or competent evidence from which a jury could
17 conclude that it was possible that Patient N was medicated
18 mistakenly or otherwise with an opiate other than Morphine.
19 The jury is not allowed to speculate about matters to which
20 there is no evidence.

21 So if you don't want me to tell the jury that they are
22 not free to speculate that there was something like that, you'd
23 better not argue it.

24 MR. NUWESRA: If I may, your Honor. I just want to be
25 able to incorporate this into my closing argument, and this

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1 should be no surprise to the defendants. The evidence clearly
2 shows that there was at least three or four conflicting
3 testimonies about that day with regard to the test of
4 Patient N. Ms. Fischer said that she collected the specimen
5 around 9:15, 930 the latest. The report itself says it was
6 collected at 12:51.

7 THE COURT: These are all things that you're free to
8 put in.

9 MR. NUWESRA: Okay.

10 THE COURT: But you're not free to suggest to this
11 jury that there was some drug other than Morphine in the system
12 because there is no evidence that there was any opiate other
13 than Morphine in Patient N's system. That's what I'm telling
14 you you may not suggest. You didn't have any expert up here
15 who analyzed the test and said this test could be for something
16 other than Morphine, and there was no evidence adduced that
17 there was any opiate other than Morphine that was missing from
18 the drug cabinet.

19 So you're asking the jury to speculate wildly if you
20 want to suggest that the patient tested positive for an opiate
21 other than Morphine, and I'm not going to allow you to do
22 that.

23 MR. NUWESRA: Well --

24 THE COURT: Now, differences in the time, differences
25 in who asked for it, inconsistencies, but it's the

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1 Morphine/opiate distinction for which you have offered no
2 evidence. All the evidence is, is Morphine is an opiate. If
3 you test positive for an-- if you have Morphine in your system,
4 you'll test positive for an opiate under the test that's used
5 at St. Barnabas Hospital. That's the only evidence in the
6 record on that precise little point.

7 MR. NUWESRA: The other thing, so as not to prejudice
8 my client, your Honor --

9 THE COURT: I'm not prejudicing your client. The
10 evidence is what it is.

11 MR. NUWESRA: I understand.

12 THE COURT: You had an opportunity to put it in. You
13 could have hired an expert who could have come in here and said
14 that test doesn't tell you whether it was Morphine or something
15 else. You did not. You did not hire an expert. You did not
16 ask any witness that question.

17 MR. NUWESRA: The only point I would like to make on
18 the record is that the defendant insists that they let her go
19 because Patient N definitely was showing Morphine; not opiates,
20 but Morphine. That's what Ms. Byrne testified to. She even
21 said that she wrote -- not herself, but the hospital wrote to
22 some regulatory agency saying that there was absolutely
23 Morphine found rather than opiates. The disciplinary --

24 THE COURT: You're missing my point. My point is that
25 if you wanted to argue to the jury that there could have been

1 something other than the Morphine, Morphine was -- the
2 hospital's position is that your client, an excellent nurse,
3 made a mistake and accidentally grabbed the wrong thing and
4 injected her patient -- not intending to -- with Morphine. And
5 that, in fact, is not even why the client says they fired her.
6 They say they fired her because she didn't respond to the
7 letters. You can make some interesting arguments about that,
8 I'll grant you. Okay? But that's their position, is that your
9 client is an excellent nurse who is a human being, like all of
10 us, and who happened to make a mistake on that day.

11 Now, if you wanted to make an argument that the test
12 for opiates was not attributable to the Morphine, you needed to
13 call some witness to do that, and you didn't. You chose not
14 to.

15 MR. NUWESRA: But we had the assistant director of
16 pharmacy who testified, as well as Dr. Adler, about the
17 positive-- the false positive and false negative. And their
18 own report says --

19 THE COURT: You can talk about false positives and
20 false negatives.

21 MR. NUWESRA: All right.

22 THE COURT: You just can't suggest that it was
23 something other than Morphine. That's what I'm saying, because
24 you have no evidence that any other opiate, any other
25 opium-based drug-- Codeine, Vicodin, Percocet-- was ever either

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1 administered, mistakenly or otherwise, or was missing from the
2 medicine cabinet.

3 MR. NUWESRA: No, I understand that point.

4 THE COURT: And you certainly don't have any evidence
5 that some Gremlin sneaked in from the outside, like an angel of
6 death, and injected the patient with opium. You have no
7 evidence of that and the jury isn't allowed to speculate about
8 things that aren't in evidence.

9 MR. NUWESRA: With regard to the missing Morphine,
10 your Honor, there is testimony that Ms. Libiran had found out
11 and put in the chart that there were two Tubexes missing
12 between six and seven, one after seven. She put-- so I --

13 THE COURT: You're missing my point. So I'll tell you
14 what. If you say something that I just told you you can't say,
15 I'll stop you and I'll tell the jury there's no evidence to
16 support that point.

17 MR. NUWESRA: Okay.

18 THE COURT: And they're to disregard your argument on
19 that point. There are a lot of arguments you can make. There
20 are lot of inconsistencies in the record. I have to tell you,
21 in the end, I don't think any of them has anything to do with
22 whether your client was fired or not, whether there were two
23 Tubexes or three Tubexes, whether there was-- the critical
24 points are there was Morphine that was missing. There was an
25 opiate, a Morphine-- no evidence that there's anything else--

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1 that ended up in your client's patient and your client changed
2 a record. That's what's relevant here. That's what relevant
3 here.

4 MR. NUWESRA: Also, your Honor, they emphasized that
5 the test was done while she was under the care of my client,
6 which that is not the truth.

7 THE COURT: They haven't said that. They said that
8 the doctor ordered the test the next day.

9 MR. NUWESRA: Okay. And the patient was under the
10 care of Ms. Fischer and I want to be able to emphasize that.

11 THE COURT: You should emphasize that.

12 MR. NUWESRA: That's all.

13 THE COURT: No question you should emphasize that.
14 Emphasize that.

15 MR. NUWESRA: Okay. Thank you, your Honor.

16 (Continued on next page)

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1 (Jury not present)

2 THE COURT: Let's talk about the charge. Objections
3 from the plaintiff. You can tell I am a great believer in a
4 plain English, no repetition, short version charge.

5 MR. NUWESRA: Are we going to be doing this page by
6 page.

7 THE COURT: Start at the earliest page at which you
8 have an objection or suggestion and make your pitch. I want
9 the record to be clear this is an interesting twist on the
10 national origin/ethnicity case. It's really kind of a negative
11 the national origin/ethnicity case. The real allegation here
12 is that the plaintiff was not Filipina, that it's a more
13 important point that she was Honduran. I don't think anybody
14 cares if she was from Honduras, Nicaragua, Panama, Colombia, or
15 Mexico, or the Dominican Republic. It's that she was not
16 Filipina.

17 MR. NUWESRA: I agree, your Honor.

18 (Pause)

19 MR. NUWESRA: Your Honor, page 5, under burden of
20 proof and preponderance of the evidence standard, second
21 paragraph, last sentence, I will read it: The balance must tip
22 in favor of believing that the particular event did not occur
23 or a particular fact did exist in order for the plaintiff to
24 meet the burden of proof required by law.

25 THE COURT: You put an extra not in there.

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1 MR. NUWESRA: You added.

2 THE COURT: You did. The sentence reads: The balance
3 pus must tip in favor of believing that a particular event did
4 occur on that a particular fact did exist in order for
5 plaintiff to meet the burden of proof by required by law.
6 Forget the first 12 pages, I am not going to change a word;
7 that's what I charge in every case.

8 MR. NUWESRA: OK.

9 THE COURT: I am not going to change my burden of
10 proof charge.

11 MR. NUWESRA: I won't waste the court's time if it's
12 going to be futile.

13 THE COURT: It would be futile to argue on my standard
14 charges.

15 MR. NUWESRA: Thank you, your Honor.

16 (Pause)

17 MR. NUWESRA: Based on the comments 5 minutes ago of
18 the court --

19 THE COURT: What page.

20 MR. NUWESRA: 18, your Honor, that this is a negative,
21 and I am referring to the third paragraph again the last
22 sentence.

23 THE COURT: I think the reason I made the comment
24 about this sort of being a negative case as she was not, I put
25 this all the way through here.

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1 MR. NUWESRA: OK.

2 THE COURT: I have not Filipina.

3 MR. NUWESRA: But when you add Honduran.

4 THE COURT: I can say something else if you want. You
5 made a big deal about her being Honduran.

6 MR. NUWESRA: Based on the race taken out national
7 origin/ethnicity that she is Hispanic or something else,
8 something else works for me.

9 THE COURT: Hispanic.

10 MR. NUWESRA: Yes, Hispanic descent, something else
11 works.

12 THE COURT: Make sure you argue, the last time I
13 looked, the Philippines was colonized by Spain. Spanish is the
14 other national language of the Philippines. I think everybody
15 in this case has a Spanish last name. I assume the defendant
16 will make that argument.

17 MR. NUWESRA: I believe that there should also be a
18 mixed motive charge in addition to this because to have
19 plaintiff not have as well a mixed motive charge.

20 THE COURT: There is a mixed motive charge. Plaintiff
21 need not prove national origin/ethnicity was the only factor
22 motivating an adverse employment decision but she must prove it
23 was a substantial or motivating factor in the decision. That's a
24 mixed motive charge.

25 MR. NUWESRA: That's the conflict I have with that

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1 sentence, plaintiff has to prove both.

2 THE COURT: Now you are into *McDonnell Douglas*. She
3 has to prove pretext that defendant lied about the reason and
4 she has to prove that the real reason was her ethnicity, and
5 that's right out of Supreme Court precedent, because the
6 hospital can lie but the real reason cannot have been other
7 than her ethnicity. This is classic right out of Supreme Court
8 jurisprudence. It's not enough to prove that the hospital is
9 pretextual. You have to prove both pretext and that the real
10 reason was discrimination. Ultimately plaintiff's burden is to
11 prove discrimination by a preponderance of the evidence. I
12 know this charge is correct as a matter of law.

13 MR. NUWESRA: For the record, your Honor, we believe
14 that her race was a reason rather than the reason, the only
15 reason.

16 THE COURT: I hear you. I think you are going to be
17 arguing that this is a mixed motive charge case. That's my
18 understanding, at least the termination I think you are going
19 to go arguing that. That wouldn't come at any great surprise.
20 That's why I say: Note that the plaintiff need not prove that
21 national origin or ethnicity was the only factor. It has to be
22 a factor.

23 MR. NUWESRA: That's on the second paragraph.

24 THE COURT: The second paragraph. I will tell you
25 what I will do to make you happy on the third paragraph. The

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1 both and is correct, I will say: Plaintiff has to prove both
2 that they were not the reasons for the hospital's actions and
3 that at least part of the real reason why this happened to her
4 is because of it. OK.

5 MR. NUWESRA: That's great, your Honor.

6 THE COURT: OK.

7 MR. NUWESRA: Thank you. Next page there is Honduran,
8 first paragraph, the ending of that sentence.

9 THE COURT: I am not prepared to change the last part
10 of that.

11 MR. NUWESRA: That she was Honduran.

12 THE COURT: Honduran rather than Filipina, yes.

13 MR. NUWESRA: Note my objection, your Honor.

14 THE COURT: OK. Anything on retaliation.

15 MR. NUWESRA: Yes, your Honor.

16 THE COURT: There's a typo on page 21.

17 MR. NUWESRA: 19, I believe we should be able to argue
18 good faith basis with regard to their business reason, there is
19 case law on that, rather than that they cannot question, they
20 can consider good faith, credibility of witnesses, and so on.

21 THE COURT: You can argue credibility of the
22 witnesses. This charge which is a standard charge in every
23 discrimination case is exactly correct as a matter of law. You
24 are free to argue they shouldn't believe defendant's witnesses.
25 There is a typo on page 21, 6th line from the bottom, Ms.

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1 Martinez is she obviously not he.

2 MR. NUWESRA: Yes.

3 THE COURT: I am correcting that.

4 MR. NUWESRA: Back to 20.

5 MR. GARLAND: Your Honor, before --

6 THE COURT: You have not said a word and don't say a
7 word until he is done.

8 MR. NUWESRA: On page 20, your Honor, retaliation,
9 fine. With regard to 21, third paragraph, I believe that under
10 case law of the Second Circuit at least as of 08, the
11 decision-maker, the protected activity, complaints of
12 discrimination do not have to be communicated directly to the
13 decision-maker.

14 THE COURT: The decision-maker has to know about them.
15 That's all I said. All it says, plaintiff has to prove that
16 the decision-makers were aware that she had engaged in
17 protected activity. It does not say plaintiff has to prove she
18 complained directly to the decision-makers. Did you read this
19 before today.

20 MR. NUWESRA: Did I over the weekend. I had to do a
21 whole bunch of other things as well preparing for the rest of
22 the day. I just want to make sure I understand it correctly.
23 With regard to causation, page 23.

24 THE COURT: The word impermissibly should be
25 mistakenly in the third paragraph.

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1 MR. NUWESRA: The last full sentence, the reason they
2 fired her was the fact because she was Honduran rather than
3 Filipina.

4 THE COURT: She brought a case alleging there was
5 discrimination against her because she was Honduran; that's the
6 case.

7 MR. NUWESRA: 27.

8 THE COURT: That has to stay in because the
9 termination is on two different theories. It should be, it's
10 national origin/ethnic discrimination and retaliation.

11 MR. NUWESRA: Race and color should go out.

12 THE COURT: It should say, I remind you that Ms.
13 Martinez is seeking to hold the defendant liable for her
14 termination under two separate theories of recovery, national
15 origin/ethnicity and retaliation. She doesn't get to recover
16 twice for the same injury. She is only entitled to be
17 compensated for damages one time. She doesn't get duplicate
18 damages if they find for her on two different theories. I
19 don't like the way this is phrased.

20 MR. NUWESRA: May I propose language.

21 THE COURT: No. Plaintiff is not entitled to recover
22 double damages for the same injury. All right.

23 MR. NUWESRA: Punitive damages.

24 THE COURT: I have never been so on the fence whether
25 to charge punitive damages. I am not going to charge punitive

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1 damages. I have your exception to that. There is on this
2 record nothing that qualifies, that's sufficiently outrageous
3 to warrant an award of punitive damages as a matter of law. I
4 am not charging punitive damages.

5 MR. NUWESRA: I respectfully ask they at least be
6 charged with regard to the New York City Human Rights Law which
7 is a different standard than Title VII.

8 THE COURT: Yes.

9 MR. NUWESRA: I am asking protectively for the record.

10 THE COURT: Make your argument. Give me a citation,
11 give me a Second Circuit case. Bring these cases in the New
12 York State Supreme Court if what you are really proceeding
13 under is the New York Human Rights Law.

14 MR. NUWESRA: I have proposed for the court's
15 convenience, one which I will give.

16 THE COURT: I need you to move quickly. I have to be
17 somewhere in 3 minutes and the defendant has not had an
18 opportunity yet. I think it's inappropriate for counsel to be
19 obviously reading the charge through rather than having
20 prepared objections in advance.

21 Can I hear your objections to the charge please,
22 Mr. Garland.

23 MR. GARLAND: I will try to be quick recognizing your
24 schedule. First one, page 12, the only reason I raise, it's a
25 typo, you want to hand it out to the jury, very last word says

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1 defendants, obviously it's only one defendant.

2 THE COURT: We will correct that typo.

3 MR. GARLAND: Page 21, third paragraph, the sentence
4 starts with the word obviously, it's people who fired Ms.
5 Martinez. In this says case it's undisputed it was just one
6 person.

7 THE COURT: I am not changing it.

8 MR. GARLAND: Page 24, a typo, second to last line of
9 that paragraph.

10 THE COURT: Which paragraph.

11 MR. GARLAND: The first paragraph, second to last
12 line, the word was, she had complained.

13 THE COURT: The word was is a typo. Thank you.

14 MR. GARLAND: Compensatory pages, page 26, I don't
15 think they should be getting compensatory damages on
16 discrimination other than discharge.

17 THE COURT: I hear you.

18 MR. GARLAND: I want to raise, during the final
19 pretrial you said you were going to give the jury a limiting
20 instruction on the letters from Mr. Nuwesra to counsel so they
21 understood they came in for a limited purpose only.

22 THE COURT: You are absolutely correct. I completely
23 overlooked that. There are exhibits, Plaintiff Exhibits 2 and
24 3, that came in for a limited purpose. That purpose was to
25 indicate --

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1 MR. NUWESRA: That she had continued interest in her
2 job.

3 THE COURT: That plaintiff continued to have interest
4 in her employment. That's the only reason you may consider it;
5 you may not consider it for any other purpose.

6 MR. GARLAND: Those letters contain allegations of
7 discrimination. I want to be clear they are not to consider
8 that.

9 THE COURT: Absolutely not to be considered for any
10 other purpose. OK.

11 MR. GARLAND: I think that's all I have, your Honor.

12 THE COURT: OK. I am not charging punitive damages in
13 this case. Under any law I do not believe this is a punitive
14 damages case. I do not. OK. See you after lunch.

15 (Lunch recess)

16 (Continued on next page)

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AFTERNOON SESSION

(1:45 p.m.)

(Jury not present)

THE COURT: Mr. Garland, how long do you have.

MR. GARLAND: I think it will be half an hour, 40, 45 minutes.

THE COURT: I think a half hour would be adequate. But OK. Mr. Nuwesra how long do you have.

MR. NUWESRA: 45 minutes to an hour.

THE COURT: Keep it on the short side.

MR. GARLAND: One question about the verdict sheet.

THE COURT: Yes.

MR. GARLAND: On section 3, the damages piece.

THE COURT: I don't have the copy in front of me.

MR. GARLAND: On section 3, the way it's structured right now, there is a single question for compensatory damages.

THE COURT: That's the way it will stay. You have your objection.

MR. GARLAND: Can I explain.

THE COURT: The objection is you want separate damages for termination and discrimination; I am not giving them to you.

MR. GARLAND: Thank you, your Honor.

THE COURT: I know what the reason is I am a great lover of general verdicts. They are less susceptible of being

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1 attacked on motion afterwards.

2 MR. GARLAND: I would like to refer to the verdict
3 questionnaire and read the questions.

4 THE COURT: You are perfectly free to do that. I will
5 tell the jury if you all talk about the law and I say saying
6 different about the law, what I say controls.

7 MR. GARLAND: Thank you, your Honor.

8 THE COURT: Let's get the jurors.

9 (Jury enters courtroom)

10 THE COURT: Ladies and gentlemen, we are now going to
11 listen to the closing arguments of counsel. During these
12 arguments the lawyers are going to explain to you why they
13 think the evidence favors their client's respective positions
14 in this case. What the lawyers say to you is not evidence,
15 just as what I said to you during the trial is not evidence.

16 The lawyers will ask you to draw conclusions from the
17 evidence as they recollect it and paint the issues for you. If
18 you find that any lawyer or a lawyer is asking you to draw an
19 inference that is warranted by the evidence that you find to be
20 credible, when I say warranted I mean is the inference rational
21 and logical and follows from the evidence, then you are free to
22 adopt the lawyer's suggestion that you draw that inference.

23 If on the other hand a lawyer asks you to draw an
24 inference that you think is not rational and not credible, not
25 supported by, doesn't flow logically from the evidence that you

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1 find to be worthy of belief, then you should just reject the
2 lawyer's suggestion that you draw that inference and draw your
3 own inference, make your own conclusion on the basis of the
4 evidence that you find to be believable and persuasive.

5 The lawyers are not witnesses so they are not supposed
6 to tell you what they think or what they believe. The problem
7 is I think or I believe has become a ubiquitous phrase in our
8 language. We frequently begin sentences with it. What the
9 lawyers are really saying to you is I submit the following
10 thought for your consideration. It only matters in the end
11 what you think and what you believe.

12 By the same token, the only memories of the evidence
13 that matter are your memories of the evidence. The lawyers are
14 going to be arguing to you from the evidence. They have a
15 memory, a recollection of the evidence. Their recollections of
16 the evidence may differ. In the end the only recollection of
17 the evidence that matters is your recollection of the evidence.
18 If you need to have your recollection refreshed, remember how
19 to do it. You send out a note to me asking the court reporter
20 to read back or possibly to provide you, we have a transcript,
21 with pages of the transcript that will help to refresh your
22 memory.

23 There are rules that lawyers have to follow during
24 summations. If one thinks the other lawyer is not following
25 the rules, the lawyer gets up and objects. There is nothing

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1 wrong with the lawyer making objections during summations. The
2 lawyer is simply calling to my attention the possibility that
3 his opponent has broken one of our courtroom rules. I will
4 rule on the objection and I remind you that my ruling on
5 objections is not a signal to you that I think one side is
6 right or one side is wrong or this guy has the better argument
7 that guy has worser argument. It's only an umpiring decision;
8 ruling on the rules.

9 I will caution the lawyers not to jump up and object
10 on the grounds that's not what the evidence shows. Because
11 that of course would be an improper objection. I don't get to
12 tell you what the evidence shows. You will decide what the
13 evidence shows. If there is difference in recollection among
14 the lawyers, you all will resolve that and if you can't resolve
15 it without resort to the evidence itself, the evidence will be
16 read back to you.

17 I told you about the burden of proof and the fact that
18 the plaintiff who has the burden of proof in this case will go
19 last so I am going to ask Mr. Garland if he will close on
20 behalf of his client St. Barnabas Hospital.

21 MR. GARLAND: I would like to set up, turn on the
22 projector.

23 (Pause)

24 MR. GARLAND: Let me begin by thanking you on behalf
25 Mr. Fullerton and myself, on behalf of St. Barnabas Hospital

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Closing - Mr. Garland

1 for listening these past now four days of trial. When I stood
2 before you, must have been last Tuesday, I believe, I then
3 asked you to please listen carefully to the evidence, look at
4 the exhibits, look at the witnesses, listen to what they have
5 to say. I want to thank you again now for having gone through
6 that process for your doing that.

7 When I got up last week, it was really to present a
8 bit of a roadmap of what was to come. Now as I am here before
9 you this afternoon what I would like to do is the following. I
10 want to explain to you what's going to come, once I am done,
11 the judge will do that some more later, but I want to take you
12 through what I submit the evidence did show, that you did hear
13 and what you did see, and then when you retire to the jury room
14 and you have the opportunity to finally discuss the case among
15 yourselves and look at the evidence and talk about the evidence
16 among yourselves, I want to take you through some of what I
17 submit was presented to you during the last four days.

18 The judge will explain this later. One of the things
19 that is going to happen later on is that she is going to give
20 you what's called a verdict sheet. The verdict sheet is going
21 to have some questions on it. I want to flag two of the
22 questions for you. I am going to be talking mostly about those
23 two questions.

24 The first question is: Did plaintiff prove by a
25 preponderance of the evidence that defendant discriminated

1 against her in the terms and conditions of her employment by
2 making decisions about her position and duties based in whole
3 or in part on her national origin/ethnicity. You as a jury
4 will be asked to decide that question, answering it yes or
5 answering it no. I submit to you the evidence supports
6 answering that question no. We will go through that evidence.

7 The second question I want to talk to you about is the
8 following: Did plaintiff prove by a preponderance of the
9 evidence that defendant terminated plaintiff's employment in
10 retaliation for engaging in activity protected by federal,
11 state and/or city antidiscrimination laws, namely, complaining
12 about alleged national origin/ethnicity discrimination. You
13 will have the opportunity to answer that question yes or no. I
14 submit again the evidence that was presented to you during the
15 course of this trial should lead you to to answer that question
16 no.

17 Let me talk about some of the evidence. When I stood
18 before you last week I said to you that nurse Martinez's
19 performance before September 14, 2009 is not in issue in this
20 case. You heard witnesses from the hospital come before you
21 and talk about how she was a good nurse or how she was an
22 excellent nurse. As I said to you, that's not in dispute.
23 What's in dispute is what you heard evidence about was what
24 happened starting on September 14, 2009 and following.

25 Using the PowerPoint, I would like to take you through

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Closing - Mr. Garland

1 some of that evidence. What I submit the evidence has shown is
2 that St. Barnabas terminated nurse Martinez's employment after
3 the following: An investigation concluded that a missing
4 nonprescribed morphine was in the urine of a patient under her
5 care, patient N. She changed another nurse's entry on a
6 narcotics control sheet. You saw that control sheet. We will
7 go through it in detail. Lastly, that she did not respond to
8 the repeated requests of the senior hospital official Cathy
9 Graham to meet with her about what happened.

10 Let's go through some of this evidence that you heard
11 in some more detail. You may remember when I was asking Ms.
12 Martinez questions, I asked her is making a mistake on a
13 narcotic a big deal in any hospital and she agreed that it was.

14 Then you met, heard from Patty Byrne, Patricia Byrne
15 who used to be an employee at St. Barnabas who worked in the
16 pharmacy. She explained to you why a missing narcotic in a
17 hospital is a big deal. She explained to you that a hospital
18 has to maintain control over its narcotics from cradle to
19 grave. She explained what that was. She explained that any
20 discrepancy in the count of narcotics must be reported to the
21 New York State Bureau of Narcotics Enforcement. She explained
22 that also the Federal Drug Enforcement Agency has control over
23 the narcotics, jurisdiction over the narcotics in the hospital.

24 I want to stop here for one moment. Ms. Byrne does
25 not work for the hospital anymore. She like so many other

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Closing - Mr. Garland

1 witnesses who were involved in what happened on the 14th and
2 the 15th, there is absolutely no evidence I would submit to you
3 that was presented to you to show that she had any bias for any
4 reason against Ms. Martinez. She explained to you what her
5 interest was, that was finding out what happened to her missing
6 narcotics.

7 You had an opportunity to go through as we considered
8 the evidence the chronology, the timeline, narcotics control
9 sheet. You heard from nurse Libiran who testified about
10 receiving morphine from the pharmacy at noon on September 14
11 and recording it on her narcotics control sheet. There was no
12 evidence by the way that nurse Libiran I would submit had any
13 bias against Ms. Martinez for any reason.

14 The narcotic control sheet shows what she wrote, what
15 was written by the pharmacy tech when that delivery was made.
16 There were 22 tubexes of morphine sulfate 2 milligrams. You
17 see it here. You will see the timeline on the 14th. There was
18 evidence that patient N was under Ms. Martinez's care then, the
19 afternoon and early evening of September 14. There is evidence
20 in the record I would submit that you saw that on September 14,
21 at 1630 military time, 4:30 p.m., there had been a drug screen,
22 urine screen that showed no opiates in patient N's system, 4:30
23 on the 14th.

24 You also heard testimony then that at 5:00, 5:00,
25 nurse Martinez went into the medication room and she recorded

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Closing - Mr. Garland

1 that she took out 3 tubexes of Ativan and recorded on the
2 narcotics control sheet. You also heard testimony that around
3 6:00 p.m. patient N became agitated and her blood pressure fell
4 to 80 over 40 and a MRI was canceled. At 7:00, the testimony
5 was, nurse Libiran had gone back into the medication room to
6 get medication, morphine, and noticed and noticed that there
7 were three missing tubexes of the morphine sulfate 2
8 milligrams. She made some entries in the narcotic control
9 sheet to reflect that.

10 So when she left the medication room there could have
11 been 21 tubexes but she counted there were only 18; there were
12 3 missing. You heard her testimony. She went to others, her
13 co-workers in district 3, the ICU where they worked, to ask did
14 anyone know what happened to the morphine. She called the
15 pharmacy to confirm there should be 22 tubexes of morphine in
16 the medication cabinet. She then contacts the nursing
17 supervisor Ms. Ondoy about the missing morphine.

18 You heard testimony from Ms. Ondoy. I would submit
19 there is no absolutely no evidence in this record that
20 Ms. Ondoy was biased for any reason against Ms. Martinez. She
21 confirmed that the 3 tubexes of morphine were missing. Then
22 she informed Pauline Lattery and Cathy Graham, both of whom you
23 heard from today. I submit there is no evidence in the record
24 to show that either Ms. Frances-Lattery or Cathy Graham had any
25 bias for any reason against Ms. Martinez. I think you heard

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Closing - Mr. Garland

1 them both say she was a really good nurse, words to that
2 effect.

3 You also heard testimony about some empty tubexes
4 being found in the garbage. You heard testimony about the
5 statements being taken from the different nurses who worked
6 that evening. You have seen those statements. Nurse Panes'
7 statement, nurse Fischer's statement, you heard testimony from
8 nurse Fischer, nurse Gonzalez, her statement, you will have
9 that in the jury room, nurse DeJesus' statement, you will have
10 that, and nurse Martinez's statement, you will have that, as
11 well as nurse Libiran's statement. I would submit that there
12 was no evidence in this record that any of those nurses who
13 provided statements about what they knew had happened that
14 evening, no evidence that any of them had any bias against Ms.
15 Martinez for any reason.

16 You will also, I believe you saw in evidence you will
17 see when you retire to the jury room, the control drug shortage
18 investigation form filled out on the evening of the 14th. You
19 heard from Ms. Ondoy that she checked the records of other
20 patients transferred out of the ICU to see in morphine had been
21 administered to them. You heard testimony that all the nurses,
22 the nurses who happened to be from the Philippines and Ms.
23 Martinez, were all subject to the same treatment, all searched
24 before they could leave that evening.

25 You saw in evidence, you will have in the jury room,

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Closing - Mr. Garland

1 the memo that Ms. Ondoy prepared for Ms. Graham, also sent to
2 Ms. Frances-Lattery explaining what it was that she had done on
3 on the evening of September 14 to try to find out what
4 happened. You will have that in the jury room with you. Those
5 are the all documents that then were provided to Ms. Graham and
6 Ms. Lattery; Ms. Ondoy's memo, the written statements,
7 controlled drug investigation form, all provided to both
8 Ms. Graham and Ms. Frances-Lattery.

9 Let's go back to Patty Byrne. We will move to
10 September 15. You heard from Ms. Byrne last Thursday what she
11 did when she came to work that day. She started to look for
12 the missing morphine because she and her department has to
13 submit a report to the New York State Bureau of Narcotics
14 Enforcement. She looked for the missing morphine; she couldn't
15 find it. She discovered an entry in the narcotics control
16 sheet, I believe the second page of the two in your exhibit
17 book, that showed the time of 6:00 p.m. had been changed to
18 5:00 p.m. by someone.

19 Then she explained to you, Ms. Byrne explained the
20 interviews that took place that day on the 15th. She explained
21 to you who sat in on the interviews, two people from the
22 pharmacy and two people from nursing. You have seen, you will
23 have the evidence with you the written notes and reports
24 prepared by Ms. Byrne going through what she learned during the
25 course of the investigation.

1 One note, nurse Libiran noted that Ms. Martinez
2 announced returning the Ativan that had not been used by the
3 doctor for the MRI. You may remember, I believe the evidence
4 was Ms. Martinez actually took out 4 of the tubexes of Ativan,
5 only recorded 3. Here at trial nurse Martinez admitted she
6 shouldn't have done that. I submit she also testified that she
7 was not disciplined for that.

8 Continuing with same report of Patty Byrne, another
9 interview, this is related to what Ms. DeJesus was saying.
10 Ms. DeJesus, another one of the nurses, reported to Ms. Byrne
11 during these interviews that Ms. Martinez was in a rush to get
12 the keys back after she had already been in the medication
13 room. You heard some testimony about that. You heard
14 Ms. Fischer according to Ms. Byrne admitting that she was the
15 one who made the change from 6 to 5.

16 You heard Ms. Byrne talk about what Ms. Martinez said
17 when she was interviewed by Byrne, Gatto, Frances-Lattery and
18 Lucero. She reported what was said. First she asked Ms.
19 Martinez who did she get the keys from. Ms. Martinez responded
20 she couldn't recall anybody. When she showed Ms. Martinez the
21 change on the narcotics control sheet from 6 to 5, Ms. Martinez
22 said she is the one who did that but she also didn't mention in
23 the interview she had taken 4 tubexes of Ativan as opposed to
24 3. I submit to you at trial Ms. Martinez admitted that she
25 shouldn't have taken out the 4 tubexes of Ativan without

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1 recording it.

2 Sticking with Ms. Byrne's report and what she was
3 concluding, she noted that the only other controlled drug that
4 was removed 3 at a time was Lorazepam. So perhaps there had
5 been an error by Ms. Martinez; she mistakenly took out the
6 Ativan as opposed to, she mistakenly took out the morphine as
7 opposed to the Ativan. Ms. Byrne also note it was unusual her
8 mind that a patient would be agitated and have blood pressure
9 too low after getting Lorazepam or Ativan but it wouldn't be
10 unusual if the patient had gotten morphine. So Ms. Byrne
11 shared with you last week what her working theory was as she
12 was going through this investigation. Her working theory was
13 nurse Martinez had mistakenly administered morphine to patient
14 N instead of administering the Ativan to her.

15 You also met Mervyn Richardson last week. I submit
16 there was no evidence in this record to suggest Mervyn
17 Richardson had a bias against nurse Martinez for any reason
18 whatsoever. He testified that morphine could be detected in a
19 patient's urine for two to three days after it was
20 administered. You also heard from Dr. Adler, the acting head
21 of ICU back in 2009. I would submit there was no evidence in
22 this record to suggest that he was biased in any way against
23 Ms. Martinez. You heard the testimony he gave. He verbally
24 gave orders that patient N's urine be sent for a tox screening,
25 to see whether or not there was morphine in her system.

1 You heard some testimony, morphine opiates, the
2 testimony I would submit to you was that morphine is an opiate,
3 and that the only evidence in the record was that patient N was
4 not prescribed morphine, she should not have been given
5 morphine, and there was nothing to suggest that she was
6 prescribed any opiate. Also in the record are three different
7 pages of the drug screens, urine screen results. Dr. Adler had
8 ordered this particular test on September 15, still on
9 September 15, and when you look at that record, the results
10 came out of the lab around 1357, little before 2:00 p.m. They
11 showed that patient N had opiates in her system.

12 Dr. Adler also testified that he looked at patient N's
13 medical record and chart and saw that on September 11, when she
14 first came to ICU, that she tested negative for opiates and
15 benzodiazepine or which could have been Ativan. Then the test
16 on the right was after she had been prescribed Ativan, that's
17 4:30 test on September 14 before she goes for the MRI later in
18 the day, she tested negative for opiates and positive or
19 benzodiazepine. It's also in the record I would submit that
20 Ativan was recorded as having been administered to patient N
21 for the first time on September 12. Dr. Adler confirmed that
22 patient N had not been prescribed morphine.

23 So going back to Patty Byrne's report which you will
24 have with you in the jury room, she concluded in her notes, no
25 morphine-like medication was ordered for this patient but the

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Closing - Mr. Garland

1 patient's result was positive. Some of the questions she is
2 asking herself, what happened to the Ativan. Her conclusion is
3 that nurse Martinez mistakenly administered morphine to patient
4 N and then may have returned to the medication cabinet and
5 removed Ativan.

6 Also you heard testimony that nurse Martinez was
7 suspended indefinitely at the end of the day on September 15.
8 You will have that suspension notice with you in the jury room
9 that explains the basis for the suspension. Conflicting story,
10 stated she changed the time on the narcotics sheet. There is
11 evidence of positive opiates in patient in 527A who was
12 understand her care, scheduled procedure for this patient was
13 not done, the patient's blood pressure had dropped 80 over 40.

14 At the time you your heard that nurse Fischer was
15 suspended. Again, she was telling a conflicting story; who
16 made the change on the narcotic control sheet from 6:00 to
17 5:00, that she was not telling the truth; she said she was the
18 one who changed the time on that record.

19 You've got Ms. Fischer, nurse Fischer and nurse
20 Martinez both suspended on September 15, both treated in the
21 same way. Nurse Fischer told you she is from the Philippines.
22 Nurse Martinez was not. Both treated in the same way. Then
23 what happened after that. You heard testimony I would submit
24 that nurse Fischer was asked to come meet with Cathy Graham.
25 She did. You heard that testimony this morning that

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Closing - Mr. Garland

1 Ms. Fischer came in and met with Cathy Graham. You heard the
2 testimony from Ms. Fischer about what she said, from Ms. Graham
3 what she said to Ms. Fischer, that she decided working through
4 it that she would suspend Ms. Fischer for three days, but
5 Ms. Fischer came in and she met with Ms. Graham.

6 Ms. Martinez was also asked to come and meet with
7 Ms. Graham. Unlike, unlike Ms. Fischer, however, Ms. Martinez
8 did not respond to the request to come in. So you heard
9 testimony, you heard testimony not from one person, from two,
10 from Ms. Graham and then Lisa Greene, the union rep, that Cathy
11 Graham had asked Lisa Greene, please bring in Ms. Martinez, I
12 want to speak with her. Now, I mention Lisa Greene. There is
13 no evidence I would submit in this record that Lisa Greene was
14 biased against Ms. Martinez for any reason at all. You heard
15 Ms. Greene's testimony. Ms. Greene, yes, she is a nurse
16 employed by St. Barnabas, but she talked to you about wearing
17 two hats. She also represents the nurses as the union contract
18 administrator.

19 She testified how she tried to reach Ms. Martinez on a
20 number of occasions to try to get her to come in to meet with
21 Cathy Graham. She testified that Ms. Martinez did not respond
22 to that request to come in. You also heard her testimony that
23 when there was no response from Ms. Martinez to the earlier
24 requests, that she sent a letter, she sent a letter to Ms.
25 Martinez asking her to contact her. You will have this letter

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Closing - Mr. Garland

1 with you in your jury deliberation room. The letter's pretty
2 simple; please contact me immediately concerning your
3 employment at St. Barnabas Hospital. It gives the direct dial
4 of Ms. Graham so that Ms. Martinez can call her.

5 I would submit you heard testimony from Ms. Martinez,
6 well, that letter was sent certified, I didn't get it right
7 away. Her testimony I would submit was that she got it, she
8 got it by October 20. I would submit to you that is what her
9 testimony was. When she got it and read it and saw the phone
10 number, she still did not call Cathy Graham. She did not
11 respond to the letter. What you heard today from Ms. Graham,
12 that's when she decided to go ahead and terminate Ms.
13 Martinez's employment.

14 She also testified today, wasn't a question I asked, a
15 question Mr. Nuwesra asked, Ms. Graham, if she had come in, if
16 Ms. Martinez had come in, what would you have done. Well, she
17 testified she wanted to speak with her to see what she had to
18 say. She wanted to be able to speak with her because as she
19 said, written statements alone don't tell the whole story. She
20 wanted to get it directly from Ms. Martinez. So when she was
21 asked that question today by Mr. Nuwesra, what would you have
22 done, she said I don't know because she never gave me the
23 chance to speak with her.

24 Ladies and gentlemen, I would submit what's going on
25 here is that Ms. Martinez is looking to blame everybody else,

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Closing - Mr. Garland

1 everybody else, all the people I put up there, all these folks
2 in the hospital, people who don't work in the hospital anymore,
3 Patty Byrne. She is looking to blame the union. She brought
4 her sister in to testify that Lisa Greene is with the union
5 said something different than what Lisa Greene said she
6 actually said. She is looking to blame everybody else.

7 I would submit, ladies and gentlemen, the blame if it
8 goes anywhere should be on Ms. Martinez, because she was given
9 opportunity to come in, because as the nurse, the hospital
10 said, she was a really good nurse, and she did not take
11 advantage of that opportunity. You also heard Lisa Greene the
12 union representative say that Cathy Graham told her that she
13 only decided to terminate Ms. Martinez's employment after she
14 failed to respond to her.

15 You will also have in evidence a couple other letters,
16 perhaps didn't talk about during trial, they will be in
17 evidence with you. One is letter, first this is the
18 termination letter, you did see that, the termination letter
19 from Mr. Wolf, director of HR, to Ms. Martinez saying that on
20 October 21, her employment was being terminated, effective
21 September 15. Then you are going to see a couple other letters
22 in evidence. One is a letter from the union saying they are
23 going to grieve the termination. Another is a letter from
24 Mr. Wolf which says that neither the union nor Ms. Martinez
25 actually showed up to pursue the grievance.

1 Another document we didn't spend any time talking
2 about during the course of trial but which you will have in
3 evidence in the jury room is the employee handbook. The
4 employee handbook talks about the fact that there need not be
5 what was referred to as progressive discipline. The hospital
6 in certain circumstances can move immediately to discharge the
7 employment of one of its employees.

8 Also you will see in that handbook the policy of St.
9 Barnabas against discrimination in the workplace which I
10 mentioned when I gave you the roadmap at the outset. You will
11 see also the St. Barnabas policy against retaliation in the
12 workplace. You will see the medication error policy. You
13 heard the purpose of the policy was to get nurses to report
14 medication errors so patient safety can be attended to, that
15 the policy was referred to as a nonpunitive policy.

16 (Continued on next page)

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1 MR. GARLAND: And the reason for that is to get
2 somebody to come forward and say they made an error. If you
3 come forward and make an error, there's no punishment. Well,
4 in this case, Ms. Martinez never came forward. She never came
5 forward. She didn't respond to Cathy Graham. And as you'll
6 see in the policy, "The senior vice president for nursing
7 reserves the right to institute immediate disciplinary action,
8 including termination."

9 Now, before I sum up, there's a couple of things that
10 I want to mention to you. When counsel are done making
11 arguments and Judge McMahon has the opportunity, she's going to
12 explain the law to you. And what she says trumps whatever
13 Mr. Nuwesra and I say. She's the authority on the law. But I
14 want to mention just a couple of things, highlight a couple of
15 things that I think you're going to hear during the course of
16 the instructions, which is why, I submit to you, should cause
17 you to answer those two questions I told you about at the
18 beginning with the answer "No."

19 First, let's talk about the discrimination claim, this
20 discrimination, the allegation, the claim, that Ms. Martinez
21 was discharged because she wasn't Filipino. The Judge is going
22 to explain to you about the preponderance of the evidence and
23 the plaintiff having the burden. And she's going to explain to
24 you that your verdict must be for the defendant unless
25 plaintiff proves that the hospital took adverse employment

1 actions because she was not Filipino.

2 Now, ladies and gentlemen, we went through that whole
3 time line of what happened on September 14th and 15th. And I
4 would submit to you that that time line shows, when you
5 consider it, there was never the slightest thought about what
6 country Ms. Martinez might be from. The whole focus was:
7 Where's the missing medication?

8 And you might say, well, maybe I would have done that
9 differently. Maybe I wouldn't have done what the hospital
10 decided here or maybe somebody will remember giving a verbal
11 order for a medication and somebody else thought they got the
12 order from somebody else. Well, ladies and gentlemen, none of
13 that, none of that, I submit to you, is enough, is anywhere
14 near enough, to satisfy the burden that Ms. Martinez has, as
15 the Judge is going to outline it to you.

16 The Judge is going to explain to you that it's not
17 your job to judge the wisdom of the hospital's actions. So
18 you'll hear more from her on that, but I also want to explain
19 to you because we've got this discrimination claim that she was
20 discharged because of her national origin and she has this
21 second question where she was discharged because she was
22 retaliated against. Again, the Judge is going to outline the
23 law here and what Ms. Martinez has to prove.

24 But, in part, you should be deciding for the hospital
25 unless she can prove that the real reason that the hospital

1 fired her -- or at least part of the real reason that it fired
2 her was the fact that she complained about discrimination
3 against her because she was Honduran rather than Filipino.
4 And, again, going through that entire time line, what happened
5 on September 14th and 15th, there was never any suggestion from
6 any of the witnesses that they were concerned about anything
7 other than where's the missing Morphine?

8 Now, before I conclude, I want to mention one other
9 thing, and that is that there's been some-- there was some
10 suggestion during the course of the trial by Ms. Martinez that
11 somehow she was denied some opportunities during the course of
12 her employment. And she says it must have been because she
13 wasn't Filipino.

14 Again, I would submit to you that the evidence doesn't
15 support that at all. Yes, the hospital has a number of
16 Filipino nurses, and you heard why and the history behind that.
17 But that doesn't mean, doesn't prove, doesn't suggest that she
18 was denied an opportunity because she wasn't Filipino. You
19 heard she is a member of the union, was governed by the
20 agreement, the collective bargaining agreement, between the
21 union and the hospital. And that what mattered in many of
22 these decisions, who got what assignment and how, was who had
23 seniority? Who was working at the hospital longer?

24 And you heard the testimony from Ms. Frances-Lattery
25 about how, when charge nurses were selected in 2008, they

1 selected 64 who were the most senior of the nurses, nurses who
2 had been there 20 and 30 years. And you know from the evidence
3 that Ms. Martinez started in 2002 and so was there about seven
4 years when her employment ended.

5 So let me just conclude by saying what I think the
6 evidence has shown you during the course of this trial.
7 Ms. Martinez's national origin or ethnicity had nothing to do,
8 nothing to do, with the hospital's decision to terminate her
9 employment. I would submit to you the evidence shows that the
10 hospital did not, did not, retaliate against her when it
11 terminated her employment.

12 And, lastly, I would submit to you that based on the
13 hospital's investigation and Ms. Martinez's failure to speak
14 with Cathy Graham, that's what brought about the end of her
15 employment at the hospital.

16 So, again, I thank you for being patient throughout
17 the course of the trial and through the course of this
18 presentation this afternoon.

19 Thank you, your Honor.

20 THE COURT: Okay. Thank you very much.

21 Mr. Nuwesra.

22 MR. NUWESRA: May it please the Court. Good
23 afternoon, Counsel. Good afternoon, ladies and gentlemen.

24 I, like Mr. Garland, would like to thank you on behalf
25 of myself and my client, Ms. Martinez, for being very observant

1 and taking your time in listening to all the evidence and
2 making sure that, before you deliberate, all the evidence is
3 in.

4 As I promised when I first stood here before you, I
5 told you that that was going to be my first opportunity and I
6 will have this other opportunity to do the same, which is
7 today. The only difference is this is my last opportunity to
8 be here and speak on behalf of my client as she views the
9 evidence that actually were submitted for your consideration,
10 ladies and gentlemen. Before I start with her version of how
11 she sees the evidence that were submitted to you, I would like
12 to take maybe five minutes or so to just address a few issues
13 or arguments that were raised by St. Barnabas.

14 Before concluding, Mr. Garland said to you that the
15 only reason that the hospital -- or one of the main reasons
16 that the hospital disciplined my client is because they wanted
17 to know, in sum and substance, what happened to the missing
18 medication. Now, I thought that they already decided what
19 happened to the medication as of 9/15/2009, when they suspended
20 my client and Ms. Fischer. They already decided that my client
21 perhaps may have misadministered by mistake the missing
22 Morphine rather than the Ativan.

23 This reminds me, and it may remind some of you who are
24 a little bit closer to my age, that Wendy's used to have a
25 commercial where this female spokesperson on behalf of Wendy's

1 would come on TV and say "Where's the beef?" I submit to you,
2 ladies and gentlemen, that St. Barnabas in this case has no
3 beef.

4 Let me go briefly and address some other issues that
5 were raised by Mr. Garland. Of course, we disagree with
6 St. Barnabas and we feel that when you do get the verdict
7 sheet, that you should find for my client in both of her
8 claims. And we will talk-- I will talk to you about it in a
9 little bit more detail why we believe that is the only fair
10 verdict in this case.

11 Mr. Garland told you that my client's issue only deals
12 with what happened on September 14th and going forward. I
13 submit to you that unless I was in a different courtroom, that
14 is not the case. My client had testified -- and I believe
15 credibly to you -- that she initially started complaining about
16 some of what she felt was discriminatory back in 2009, early
17 on, and she recalls it was at least as of April of 2009, after
18 she got that certification or that recognition, which is in my
19 blue binder there. Please take a look at it and that will give
20 you the time frame of what she believes it was then.

21 Defendant tried to give you the impression that my
22 client did do charge nurse duties. If you'll recall, they had
23 Ms. Libiran. Now, remember, Ms. Libiran is very important.
24 They suggested to you that she has no bias against my client.
25 I disagree. We disagree. And if you'll recall, when my client

1 initially complained about not having those appointments of
2 being the charge nurse, she compared herself to Ms. Libran.
3 Remember? They claim that it goes by seniority initially, and
4 then they changed the theory and now they're claiming that
5 there is a committee -- and I will get into all that -- the
6 committee that Ms. Lattery earlier this morning said consisted
7 of herself, Ms. Graham and Dr. Adler.

8 You heard Ms. Graham when I asked her, Did you ever,
9 in sum and substance, not recommend her for this? She said no.
10 Also, when I questioned her, I did not ask her the way
11 Mr. Garland phrased the question with regard to if my client
12 had contacted her. My question to her -- and your memory is
13 your memory-- but as I recall, since I asked the questions, I
14 asked her, Had my client called you after receiving this letter
15 of October 12th, 2009, would you have taken her back to work
16 like you did with Ms. Fischer? And her answer was then, Well,
17 I don't know. I could not tell. So that gives you her state
18 of mind at least as of October 12th, or thereabouts, of 2009.

19 Let's talk about Dr. Adler and this investigation that
20 took place which, in my opening statement, as you'll recall, I
21 termed it as being perfunctory. Now, they tried-- defendant
22 tried to say that my client-- and I believe it was in their
23 opening statement. They changed their tune because the
24 evidence doesn't show that.

25 They said two things in their opening statement that

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Summation - Mr. Nuwesra

1 comes to mind: One is that it is Ms. Byrne who thought it was
2 a good idea to test Patient N for Morphine. That is not the
3 evidence that was here before you when I asked Ms. Byrne
4 whether she had anything to do with it, and she said, no, she
5 did not. As a matter of fact, my recollection of her facial
6 expression was kind of "I don't know what you're talking about.
7 This is the first I hear of it."

8 Now, Ms. Lattery said today that Dr. Adler only got
9 involved at the conclusion of all the interviews of the
10 different nurses that were involved, including my client. Now,
11 my client is -- I'm positive that he told you that she did not
12 get to go up and be interviewed until about between 2 and 3
13 p.m. Ms. Lattery tried to give you the impression it was
14 earlier, but when she was questioned about the recognition date
15 and what would be -- where would the nurses be? Would they be
16 caring for the patients? She adjusted a little bit. And she
17 had to admit that she really didn't recall when it was
18 finished.

19 My client recalled when she was interviewed because --
20 let me share this with you. My client has been living in a
21 twilight zone since that day, which is the 15th of September,
22 2009, so she would remember what happened. She would be in
23 the best position to remember when it happened and why it
24 happened.

25 So why are they adjusting their time line? I'll tell

1 you why they are adjusting their time line. Ms. Fischer
2 unquestionably said that on the 15th of September, she came--
3 she started working. At around 8:45, maybe 9:00, she received
4 Patient N. Within 15 minutes to half an hour, she was told,
5 not by Dr. Adler as he testified, but by nurse manager/educator
6 Lucero who told her that she needed to take and make sure that
7 there was a test done on Patient N's urine for toxicological
8 purposes. If you look at the report itself, it says that it
9 was-- now, Ms. Fischer, who did the collection herself, said it
10 was about 9:15, 9:30. The document that they submitted for
11 your review said the collection happened at 12:51.

12 Dr. Adler said that it was he who asked her to take
13 the collection. Well, then, she knew who asked her.
14 Ms. Fischer knew who asked her. Then, based on Ms. Lattery's
15 belated testimony earlier today, she said Dr. Adler had no
16 involvement whatsoever until they interviewed all the
17 questioned-- or the nurses that were in question. This is very
18 important. This is very important for the ability of who is
19 more likely than not telling the truth to you, ladies and
20 gentlemen. I submit it's really my client.

21 Now, let me talk to you a little bit before I go into
22 my client's recitation and testimony that she gave you under
23 oath here.

24 Ms. Greene. Let's talk about Ms. Greene. If you'll
25 recall Ms. Greene, she came in the first day and she said that

1 she talked to my client; that then there was a cutoff of
2 communication. But by her own estimation, she said that if
3 there was any cutoff in communication, it had to have happened
4 towards the end of September or early October. And I'll tell
5 you why. She remembered, after my client's suspension, which
6 started on 9/16/2009 -- and you'll recall her, she said that
7 she talked to my client hours at a time. Hours. And I asked
8 her to tell me how often, and she said, "I don't know. More
9 than 15 times." So if you add 15 to September 16, you'll come
10 up to the end of September or early October.

11 Now, there is no question that at one point my
12 client -- and it's conceded, felt, after talking to her union
13 people, that they were conflicted because they were taking the
14 side of Ms. Fischer over her because they both-- which is
15 understandable. There was a conflict. So that they had two
16 different members and the two different members were pointing
17 at each other with regard to the changing or the correction of
18 the narcotic sheet. And I'll get to that, too, in a minute or
19 so.

20 Now, it's understandable why the union, perhaps, would
21 choose to take Ms. Fischer, who has more seniority than my
22 client; who has been contributing her dues a lot more. You
23 know, it was their call. But they should not have left my
24 client in the cold and thrown her under the bus, as they did.

25 Now, let me now tell you my client's recitation of the

1 evidence before you. There is no question that my client had
2 good performance. You heard Dr. Stumacher who came, who made
3 it a point of coming here to testify on her behalf. He was her
4 witness. After pulling a 24-hour shift, he was here and he was
5 very patient. And he told you at least two times, in the
6 beginning of his testimony and at the end of his testimony,
7 that my client was an excellent nurse. He also told you, just
8 like Dr. Richardson, that she was very professional. She had
9 good work ethics and good work manners.

10 My client, in the very beginning, in my open
11 statement, said that she had no issue with Ms. Byrne. She
12 understands that Ms. Byrne wasn't one of the people that she
13 complained to; that she was there representing the pharmacy and
14 the pharmacy's interests. That was conceded in my opening
15 statement. So there is no need for St. Barnabas to come here
16 and start mixing apples and oranges.

17 This is what my client testified to, and I believe
18 this is what the evidence shows unquestionably. My client
19 started in July of 2002. She was an excellent worker. She had
20 no issues whatsoever with the hospital until sometime after
21 2007. And why do I say sometime after 2007? You'll recall her
22 testifying that she received a special certification in I.C.U.
23 training. Not only that, but in 2008 she began a master's
24 program.

25 Remember, she told you that she's the proud single mom

1 of a teenager who at that time period was starting high school.
2 She was happy working for St. Barnabas. And the most ludicrous
3 thing that she heard during this whole case, and especially
4 during the testimony in this court, was that she had no
5 interest in her job, ladies and gentlemen. When she was
6 questioned, what did she say to you? Of course I have an
7 interest in my job. I was a single mom. I needed my job. My
8 son, who goes to a private Catholic school, needed the support.
9 I was earning in the upper 90s -- I believe she gave you two
10 figures: One almost 100 and one almost 97. And this is in the
11 evidence, ladies and gentlemen, as Exhibit 6, her tax returns
12 for those three years.

13 Now, you can call my client, figuratively speaking,
14 anything that you want, but my client is not ignorant and she
15 is not stupid. She knew that she had something good when she
16 had it. Not only that, but it was her goal to help and give
17 back to her local community, which is the South Bronx. And she
18 liked working I.C.U. Do you recall when she testified that she
19 was hoping that at least she can become a manager? Just like
20 Ms. Lucero, just like Ms. Ondoy. Just like all the other
21 Filipinos that were there working with her. She wanted that.
22 Just like Ms. Lattery, who was here today.

23 Now, sometime in 2009, after she received this special
24 recognition, she's feeling good and she goes and she approaches
25 her immediate supervisor, Manager Lattery. And she says to

1 her, Look, I've been here for so long. I don't get any charge
2 nursing assignments. I don't see why is that. And they give
3 her the excuse that it goes by seniority. But, like I said,
4 she's not ignorant and she's not stupid. She is midway in her
5 master's. And she starts observing and she sees who, out of
6 all the people, doing charge nursing admittedly? Ms. Libiran.

7 Now, the funniest thing is that defendant tried to
8 show that my client did do charge nursing. And who do they
9 ask? Ms. Libiran. Ms. Libiran says, Oh, yeah, when I first
10 joined the unit and worked with Ms. Martinez, she was the
11 charge nurse. But she had forgotten that earlier on in my
12 direct, she had told us that she started in surgical and then
13 she went about a year or so later to I.C.U and for eight months
14 she worked the night shift, 7 p.m. to 7 a.m.

15 Guess what shift my client was working at that time
16 and throughout her tenure? 7 a.m. to 7 p.m. And then I said,
17 well, maybe they overlapped for four months. I gave her the
18 opportunity and I asked her, Can you please tell us, when did
19 you switch from the medical-surgical to I.C.U.? She said, Oh,
20 I can't remember. I said, Give me a season. She said about
21 May, maybe April, not earlier. If you add eight months from
22 May or April, you only come up to December of '05 or January of
23 '06. She never worked with my client on the same shift during
24 that time period. So there is another fallacy. There is
25 another incredible testimony.

1 Now, would Ms. Libiran have a bias against my client?
2 Absolutely. Because it was Ms. Libiran that she complained to
3 Ms. Lattery and further to Ms. Ondoy. That's her testimony.
4 And furthermore, sometime in September, August/September, when
5 she sat down for her annual performance evaluation and she
6 revisited the issue with Ms. Lattery, where Ms. Lattery invited
7 her to talk to Ms. Graham herself, remember what Ms. Graham
8 said? She has an open door policy. She was proud to share
9 that with us.

10 Well, guess what? My client took advantage of that
11 open door policy and she went and she spoke to Ms. Graham.
12 What did she tell Ms. Graham? Your memory is your memory, but
13 as I recall her testimony, she complained about discrimination,
14 not the opportunity of having to work charge nursing. She
15 complained to Ms. Ondoy. They said, Why would Ms. Ondoy have a
16 bias to her? Why would Ms. Lucero have a bias to her? Because
17 Ms. Ondoy and Ms. Lucero told her she could not speak Spanish
18 on the floor, yet they spoke the Filipino dialect and they
19 allowed their other Filipino staff to speak the Filipino
20 dialect with no issues.

21 Nobody came here and denied that. Did you notice
22 that? Nobody came here and denied that. Ms. Ondoy didn't deny
23 that my client complained to her about discrimination.
24 Ms. Graham didn't deny it today that -- she was there with my
25 client. She didn't deny that she complained to her about

1 discrimination and retaliation. Ms. Lattery tried.

2 But I submit to you, ladies and gentlemen, based on
3 the testimony of my client, that's uncontroverted by Ms. Ondoy,
4 Ms. Graham, Dr. Richardson. Remember, she had complained about
5 the kind of assignments she gets, about the fact that she
6 doesn't work charge nurse. That's how he termed it. But it is
7 more preferential treatment that she observed and she
8 experienced that were given to the Filipinos and not to her.

9 So she meets with them at the end of August/early
10 September. And what happens? Her nightmare started when she
11 shows up to do what? Overtime. Does that sound like this
12 person, Ms. Martinez, wasn't interested in her job, going to
13 work overtime on the 14th of September? I submit otherwise to
14 you, ladies and gentlemen.

15 And so she works. No problem. And what happens that
16 day? And you have the evidence before you. I urge you to look
17 at all of it, their exhibits and my exhibits, and to review it
18 in toto, in totality, before you come to a final conclusion.
19 But what does it show? On the day in question, Ms. Libran is
20 the only one that dealt with the-- regardless of what they
21 claim that my client did, the documentary evidence that they
22 submitted shows that Ms. Libran is the one who received the
23 Morphine for that day. And she found between six and seven,
24 based on that document, that there were two 2 milligram Tubexes
25 missing. Does she tell anybody about it? I didn't hear that

1 she did.

2 Then, remember, there was stipulations of fact. And
3 the stipulations of fact state that she was supposed--
4 Ms. Libran was supposed to do the counting that evening. But
5 for some reason that wasn't explained to any of us here, it was
6 Ms. DeJesus, based upon the documentation, and I believe
7 Mr. Panes, the one who was coming on to the evening shift, that
8 did the counting in the evening.

9 And after Ms. DeJesus and Mr. Panes found out that
10 there was some-- and how much there was is even more conflicted
11 based on the evidence that you heard. And I'll visit it very
12 quickly in just a few seconds. After Ms. DeJesus found out,
13 then there is another entry after 7 p.m. for one more missing
14 2-milligram Tubex.

15 Where do they found-- where do they find the empty
16 Tubexes of three Morphines? In the regular garbage.
17 Ms. Graham said that that's a no-no. I believe Ms. Ondoy said
18 that that's a no-no. Ms. Libiran testified that she sometimes
19 did that. She couldn't remember whether she did it on that day
20 or not, but she did it. Worse, sometimes she even left it
21 right there. She didn't know what other people did with it.
22 Up until today, I had no idea that they actually had needles in
23 them, so that even makes it worse.

24 Was Ms. Libiran held responsible for that? Was she
25 disciplined? No.

1 So my client did the same thing every other one did
2 except for one, Ms. Lucero. If you'll recall, Ms. Ondoy said
3 that Ms. Lucero did not have to write a statement. And the
4 only thing that was done for Ms. Lucero, she reached out to her
5 and called her to find out if she used any Morphine when she
6 came to D3 that day and took any Morphine out. And she told
7 her verbally no, and that was the end of it.

8 Now, my client went through the same thing that the
9 other Filipino nurses went through. She gave a statement when
10 she was asked to; she met with the committee when she was asked
11 to; she cooperated.

12 Now, somehow through this case, defendant,
13 St. Barnabas, is saying, oh, you know, it was the hospital who
14 found out that there was a change or a correction with regard
15 to Ms. Fischer's 6 p.m. to 5 p.m. of September 14th. But if
16 you look at the same document, I believe it's DX-12, it's the
17 narcotics sheet. Maybe DX-13. Yeah, DX-13. Anybody can see
18 that, on the second page, that there was the same penmanship
19 with the same writing at 12 p.m. that was done by Ms. Libiran--
20 by Ms. Fischer, I'm sorry, and that there were others. So the
21 handwriting just doesn't make any sense to my client, because
22 there was one similar handwriting at 12 noon and another one, I
23 believe, at 1 a.m. So that just doesn't make any sense.

24 But what really makes sense is my client testified
25 under oath and what has been consistently her position. Now,

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Summation - Mr. Nuwesra

1 make no mistake about it, ladies and gentlemen, my client
2 believes that what she did was wrong. But did the punishment
3 fit the crime? Absolutely not. And she's not asking for any
4 better treatment than the other Filipino nurse that was
5 implicated or the other one that wasn't implicated at all,
6 Ms. Libiran. All she wanted was equal treatment, even when it
7 came to the discipline.

8 What happened with Ms. Fischer, she was returned after
9 three weeks. But if you look at the documentations that was
10 submitted with regard to her disciplinary -- suspension
11 disciplinary, it was then, later on, reduced to two days. And
12 then the language was changed whereby initially they said that
13 future similar-- "future similar misconduct will lead to and
14 including termination," and then that was also changed to take
15 the word "termination" out. It is in their black evidence
16 book. Please pay attention to that.

17 Now, the next day she comes in and now they're talking
18 about patient care. According to them, at least early on on
19 9/15/2009, St. Barnabas suspected that my client had
20 misadministered the medication accidentally, or by mistake, yet
21 they allowed her to work until all the way until 7:00. Was
22 patient care undermined at the time? I submit to you this has
23 nothing to do with patient care. This had to do with a
24 retaliatory motive. Because my client, as was described by her
25 sister, as you probably observed, is a proud woman who likes to

1 get equal treatment. Her sister testified and said that she
2 is, and has always been, the strong one in the family. I
3 submit to you that my client has always and consistently been
4 the strong one because she had to set an example as a single
5 parent for her teenage son and protect him in any way, shape or
6 form.

7 So what happens after that? Ms. Lattery comes in
8 around 6:30 and tells her, You have to get your union rep
9 because you're going to get discipline the. She doesn't tell
10 her exactly what it is. And my client, once again, protests.
11 because at that time -- and if you remember, Ms. Fischer said
12 she wasn't suspended until the next day, the 16th. She was
13 cross-examined on that. She insisted that was the second day,
14 the 16th. My client said this is unfair, in sum and substance.
15 This is unfair, this is retaliatory, this is discriminatory. I
16 submit to you, to cover their tracks, they decided to also --
17 to also suspend Ms. Fischer the following day.

18 And so my client is on suspension and she hears from
19 Ms. Lisa Greene on or about the 17th or the 18th of September.
20 She testified, and the record indicates, that she never had any
21 similar disciplinary procedure with a union or anybody else
22 before this. This sounded like mumbo-jumbo to her. And
23 realizing that she had another educated sibling, Ms. Santiago,
24 she decided to call her up so that she can lend her her ears
25 and see what's happening and walk her through the maze and

1 through the nightmare that was created by St. Barnabas.

2 And what do both of them say? They say they had a
3 conversation with Ms. Greene. Ms. Greene corroborates many of
4 what was said and she denies the others. And, again, I asked
5 Her, well, didn't you feel conflicted? She says, conflicted,
6 yes, but let me explain, and she went on to explain, to
7 distinguish it. But you know what? It is what it is. She was
8 conflicted. You have two members of the same unit, they're
9 both pointing at each other. It's a conflict. All what it is
10 is a conflict.

11 So during this telephone conversation, what happens?
12 She tells her that the hospital is offering her two options, if
13 that's what you want to call it: One is resign or, two, under
14 duress resign because otherwise we're going to report you to
15 the State. And I believe the testimony shows that they did, in
16 fact, at one point report her to the State. But my client
17 continues to work as a nurse. And the reason I say that is
18 because you'll recall that she said that sometime in December
19 of 2010, she began to make the same kind of money that she was
20 accustomed to as a nurse.

21 And so conflicted, having no faith in her union, she
22 decides to get a private attorney. Nothing is wrong with that,
23 is there? That's her right. And I asked, in sum and
24 substance, Ms. Greene if that was all right. Yeah, but, you
25 know, you have to waive this and waive that, but it is,

1 nonetheless, her right. But -- and the evidence shows, in
2 their own exhibit booklet, that she grieved her suspension,
3 because the union submitted the grievance.

4 And what does Ms. Greene say, right, to try and help
5 the hospital, whom she still works for? And she's been there,
6 I don't know, 23 or 27 years. I know she's been 15 years
7 wearing two hats. Right? What does she do? She says that she
8 only gave her three options: One is she can negotiate the
9 resignation on her behalf, which my client did not want, and
10 the other one is she can grieve it. I ask her, Isn't that what
11 you wanted? She has to concede, especially the second day she
12 testified, she had to concede that she did grieve her
13 suspension. And the union, in fact, did submit a formal
14 grievance procedure on her behalf.

15 Does that mean my client is not interested in her job,
16 ladies and gentlemen? I think not. I think she's very
17 interested in her job. She was willing to do that and then
18 hire an attorney to protect her rights, as well.

19 Now, I asked her whether I was authorized to write to
20 the defendant on her behalf, and she said yes. And there is a
21 letter from me dated, I believe, towards the end of September
22 somehow there in the record. And in the letter there should be
23 no question that she continued to seek her job and be
24 interested in her job.

25 And so what happens now? She has-- she thinks she has

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Summation - Mr. Nuwesra

1 two people working on her behalf, or one entity and her lawyer,
2 and that she's good. So she relies on that and the process
3 takes it place. And Ms. Graham conceded that at one point she
4 knew that she had hired her own attorney. She didn't remember
5 whom, but she remembered that she did. And then Ms. Graham
6 sends her a letter. It's not cc'd to either her attorney or to
7 the union. What did Ms. Greene say? Once you start the formal
8 disciplinary process, grievance process, communication should
9 be through the union. This is another violation of policy,
10 practice, or whatever, when it came to my client. There were
11 no cc's to the union. And it was uncontroverted that my
12 client. There was nobody who came in here and said, no, it
13 wasn't around the 20th that she received it. Because,
14 remember, she said she had to go and sign for it so the
15 hospital would have the green sheet that she signed for it.
16 I'm sure it would show when she signed for it. My client
17 unequivocally stated that she got it on the 20th of October.
18 Remember, there was testimony from her sister that she tried to
19 help her out. Sometimes she took her Upstate to stay with her,
20 and so on and so on. So she couldn't sign for it until the
21 20th.

22 She calls her union, because it's the right thing to
23 do. You're being represented by the union; you want to share
24 it with the union. And the next day she's terminated.

25 I submit to you, ladies and gentlemen, that there is

1 no question under the totality of circumstances that any, any,
2 reasonable person would find that my client was not subjected
3 to discrimination and retaliation in the terms and conditions
4 of her employment. And as you know, she had testified, and
5 Ms. Libiran confirmed, she had testified-- I'm sorry, and her
6 sister confirmed that my client had suffered as a result of her
7 treatment by defendant. And I will get into that in just two
8 or three minutes.

9 Before I do that, just to share with you that the
10 testimony showed that the four other-- four other nurses that
11 were involved were both Filipinos; that everybody between her
12 and Ms. Graham in the chain of command was Filipino except for
13 Ms. Lattery, and that's what the record indicates. I'm not
14 going to bore you with the names and their titles at this
15 point, as I'm sure you'll recall there was a lot of testimony
16 about that.

17 Now, let me talk to you about the compensatory pain
18 and suffering that my client had suffered and ask that you
19 return a verdict in her favor for both the discrimination that
20 she suffered in the last year or so of her employment, the
21 retaliation she suffered, and then the eventual discriminatory
22 treatment while on suspension when it came to Ms. Fischer
23 versus her and the further retaliatory treatment because she
24 continued to engage in-- she continued to complain of
25 discrimination.

1 As you'll recall, we had Dr. Stumacher, who I believe
2 his words were, when he spoke with her, whenever that was, it
3 was definitely after she was suspended, that she was angry and
4 that she felt that she was mistreated. She had personally
5 testified that she was depressed, anxious, angry; that she had
6 lost her self-esteem; that she had crying spells; that she lost
7 weight; that she lost sleep; that she saw doctors. She saw at
8 least two MDs, her primary physician and some specialist. I
9 think the word is "gastroenterologist." And that she had
10 heartburn, she had eating issues, and these were related to her
11 stress for which she also sought psychological, mental, help
12 for.

13 She testified that she saw a psychologist from
14 November 2009 to February 11 with a little break. As you'll
15 recall, the first break was caused by the fact that she lost
16 her insurance with the union. And the reason that her
17 psychologist/patient relationship was terminated in February
18 2011 was because the psychologist at the time had retired.

19 Now, this was corroborated in part, great part, by her
20 sister, who also testified that they were very close; that she
21 observed her mental anguish, in sum and substance. I'm not
22 quoting her. That she had - she would go often and that at
23 times she would even go with her to the doctor. I'm not going
24 to bore you with more details as you have been here, as I
25 stated before, paying a lot of attention and there was a lot of

1 testimony about that.

2 Just give me one minute, your Honor.

3 THE COURT: Sure.

4 MR. NUWESRA: In closing, and before I thank you and
5 sit down, I would like to take a few minutes to urge you,
6 ladies and gentlemen, to go back and deliberate, vote your
7 conscience, and return a verdict for my client in her favor on
8 her claims and award her what a reasonable person in her shoes
9 should be awarded in compensatory damages for pain and
10 suffering. She has great faith in you. She does believe in
11 the jury system. That's why she opted to be judged on the
12 facts by you, members of her community and her peers.

13 In closing, we thank you and we wish you Godspeed.
14 And may God bless you and bless the United States of America,
15 where citizens such as my client, who had come to this country
16 when she was young, has the opportunity, the right, and the
17 privilege to be judged by the peers and members of her
18 community.

19 I thank you.

20 THE COURT: Folks, what we're going to do is take a
21 five-minute break so that you can stretch and clear your heads.
22 You can leave your notebooks in the back, because you're going
23 to have copies of the charge back in the jury room, so you
24 don't have to take notes during the charge. At 3:30 I'll give
25 you the charge. Okay? Don't discuss the case. Keep an open

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Summation - Mr. Nuwesra

1 mind.

2 (Jury excused)

3 THE COURT: Okay. See you in ten.

4 (Recess)

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Charge

1 THE COURT: I need counsel to initial that then we
2 will bring in the jury.

3 (Pause)

4 (Jury enters courtroom)

5 THE COURT: Ladies and gentlemen, now that you have
6 heard the evidence and the arguments of the lawyers, it's my
7 duty to give you the instructions of the law that apply in this
8 case. It is your duty as jurors to follow the law as stated in
9 these instructions and to apply the rules of law to the facts
10 as you find them from the evidence in the case. You are not to
11 single out any one instruction as stating the law. You are to
12 consider the instructions as a whole. You are also not to be
13 concerned with the wisdom of any rule of law stated by the
14 court. Regardless of any opinion you may have about what the
15 law ought to be, it would be a violation of your sworn duty to
16 base a verdict on any view of the law other than the one given
17 to you in the instructions of the court.

18 Remember that nothing I say in these instructions is
19 to be taken as any indication that I have an opinion about the
20 facts of the case. It is not my function to determine the
21 facts of the case. That duty is yours.

22 You must weigh and consider this case without regard
23 to sympathy, prejudice or public opinion. In reaching your
24 verdict you must not consider anything other than the evidence
25 that has been presented to you in this action. Both the

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Charge

1 parties to the case and the public have the right to expect
2 that you will carefully and impartially consider all the
3 evidence in the case, follow the law as I state it for you, and
4 then reach a just verdict regardless of the consequences.

5 The case should be considered and decided by you as an
6 action between persons of equal standing in the community, of
7 equal worth, and holding the same or similar stations in life.
8 All persons stand as equals before the law and are to be dealt
9 with as equals in a court of justice.

10 As I told you previously it is your function as jurors
11 to decide the issues of fact. And your decision on the issues
12 of fact is to be based solely on the evidence. The evidence
13 consists of the sworn testimony of the witnesses and the
14 exhibits that were received for your consideration. And there
15 is a third form of evidence which is not mentioned here but
16 which will be by the time you see it, there are a number of
17 stipulated facts in this case, a large number of facts that the
18 lawyers agreed could be deemed proved and those are evidence in
19 the case.

20 Remember that nothing I say is evidence; nothing that
21 either of the advocates say is evidence.

22 You have heard objections by the lawyers to certain
23 questions during the course of the trial. It is the duty of
24 lawyers to object when the other side offers testimony or other
25 evidence if they believe it is not properly admissible. When I

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1 sustained an objection to a question, you as jurors are simply
2 to disregard the question. You can't draw any inference from
3 the wording of the question and you can't speculate about what
4 the answer would have been if the witness had been permitted to
5 answer.

6 Questions by themselves are not evidence. Asking a
7 question to which an objection was sustained does not presume
8 the question would favor the party asking the question.
9 Sustaining an objection means only that the question should not
10 have been asked.

11 The court does not, in allowing testimony or other
12 evidence to be introduced over the objection of counsel,
13 indicate any opinion as to the weight or effect of such
14 evidence. You the jurors are the sole judges of the
15 credibility of all witnesses and the weight and affect of all
16 the evidence in the case.

17 In a civil action like this one the plaintiff, the
18 person who brings the lawsuit, has the burden to prove every
19 essential element of her claim if she is to recover damages
20 from the defendant. Unless the plaintiff can demonstrate each
21 essential element of her claim by what we call a preponderance
22 of the credible evidence, then your verdict must be in favor of
23 the defendant.

24 The credible evidence means the testimony or exhibits
25 that you find worthy of belief. The plaintiff has convinced

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1 you by a preponderance of the evidence if after you have heard
2 all of the evidence you believe it more likely that some event
3 occurred or some fact exists. In this case, for example, the
4 plaintiff has to prove by a preponderance of the evidence that
5 she was the victim of discrimination and/or retaliation. If
6 you believe it more likely than an event did not occur or that
7 a fact does not exist, then the matter has not been proved to
8 you by a preponderance of the evidence.

9 You will remember, I told you at the beginning of the
10 case, if after having heard everything, you find that the
11 likelihood is still evenly balanced 50/50, maybe yes maybe no,
12 then the party having the burden of proof, the plaintiff, did
13 not succeed. The balance must be tip in favor of your
14 believing that the particular event did occur or the particular
15 fact does exist in order for the plaintiff to meet the burden
16 of proof regard by law.

17 In determine whether something has been proved by a
18 preponderance of the evidence, you may consider the testimony
19 of all of the witnesses regardless of who called them and all
20 exhibits received into evidence regardless of who may have
21 produced them. A preponderance of the evidence, however, does
22 not mean that greater number of witnesses or how much time
23 either side employed at the trial. The phrase refers to the
24 quality of the evidence, its weight or its significance, and
25 the effect that it has on your minds.

1 Some of you may have served as jurors at a criminal
2 trial or watched movies or read articles dealing with criminal
3 cases and so you are familiar with the phrase proof beyond a
4 reasonable doubt. That standard does not apply in a civil
5 trial. That is the standard of proof that society requires
6 before someone can be found guilty of a crime and lose his or
7 her liberty. That's a different standard than the standard
8 applicable in a civil lawsuit like this one, so put out of your
9 mind any discussion you may have heard about proof beyond a
10 reasonable doubt. In a civil case, plaintiff's burden is to
11 prove her claim by a preponderance of the credible evidence as
12 I have just explained that standard to you.

13 Now I know where the stipulations of fact come. They
14 were back here. They were here all alone. Let me remind that
15 a stipulation of fact is an agreement between the parties that
16 a certain fact is true. That means they are evidence. You
17 must regard those facts as true but how you use those facts in
18 deciding your verdict is up to you. You can decide that they
19 are important, that they are not important. We will have them
20 in writing with you back in the jury room.

21 There are generally speaking two types of evidence
22 from which you may properly find the truth as to the facts of
23 the case. One is direct evidence, the testimony of an
24 eyewitness being the principal example, easiest example of
25 direct evidence. The other is indirect or circumstantial

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1 evidence, the proof of a chain of circumstances that point to
2 the existence or the nonexistence of certain facts.

3 You should know that the law draws no distinction
4 between direct and circumstantial evidence. It simply requires
5 that you the jury find the facts in accordance with a
6 preponderance of all the credible evidence in the case, both
7 direct and circumstantial.

8 I have to give you what's called a limiting
9 instruction. Two of the exhibits that were introduced into
10 evidence are Plaintiff Exhibits 2 and 3. Those are letters
11 that Mr. Nuwesra sent to representatives of the hospital.
12 There were some discussion about them in closing. I don't
13 think you heard very much about them before that. Plaintiff
14 Exhibit 2 and 3 were admitted for a limited purpose. That
15 means you can only consider them for a limited purpose. You
16 made consider them for the purpose of deciding whether Ms.
17 Martinez did or did not show continued interest in her
18 employment with the defendant. That's the only reason why
19 those letters were admitted and you can't think about them in
20 connection with any other issue.

21 You the jurors are the sole judges of the credibility
22 of the witnesses, of the weight that their testimony deserves.
23 You may be guided by the appearance and the conduct of a
24 witness or by the manner in which the witness testified or by
25 the character of the testimony the witness gives or by evidence

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1 you find to be credible that's contrary to what the witness
2 testified.

3 But you should carefully scrutinize all the testimony
4 you have heard, the circumstances under which each witness
5 testified, and every matter in evidence that tends to show
6 whether a witness is worthy of belief. Consider each witness's
7 intelligence, motive, state of mind and demeanor while on the
8 witness stand. Consider the witness's ability to observe the
9 matters about which he or she testified, whether the witness
10 impresses you with having an accurate recollection of those
11 matters. Consider any relation each within may bear to either
12 side of this case, the manner in which each witness might be
13 affected by the verdict, and the extent to which if at all each
14 witness's testimony is supported or contradicted by other
15 evidence in the case.

16 Inconsistencies or discrepancies in the testimony of a
17 witness or inconsistencies or discrepancies between the
18 testimony of two different witnesses may or may not cause you
19 to disbelieve what someone has said to you. Two or more
20 persons witnessing an incident or transaction may see or hear
21 it differently. An innocent misrecollection like failure of
22 recollection is not an uncommon experience. So in weighing the
23 effect of a discrepancy, always consider whether it pertains to
24 a matter of importance or to an unimportant detail, and whether
25 you believe the discrepancy results from innocent error or

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1 intentional falsehood.

2 After making your own judgment you will give the
3 testimony of each witness such weight if any as you may think
4 it deserves.

5 As parties to the action, some of the witnesses you
6 have heard have an interest in the outcome of the case. An
7 interest in the outcome may create a motive to testify falsely
8 and may persuade a witness to testify in a way that advances
9 his or her interests. If you find that any witnesses whose
10 testimony you are considering has an interest in the outcome of
11 the trial, you should bear that factor in mind when evaluating
12 the credibility of his or her testimony.

13 But it does not automatically follow that testimony
14 given by an interested witness should be disbelieved. There
15 are people who no matter what their interest in the outcome of
16 a case would never testify falsely. It's for you to decide
17 based on our own perceptions and your common sense to what
18 extent if at all a witness's interest has affected his or her
19 own testimony.

20 If you should find that a witness has testified
21 falsely about a material fact, the law permits you to disregard
22 that witness's testimony in its entirety. If I can paraphrase
23 that, if somebody lies to you on the witness stand about
24 something that's important to your determination of this case,
25 you are perfectly free to say a person who lies in one thing

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1 can't be trusted at all and just disregard that person's
2 testimony entirely. You are not required to do that, however.
3 You can accept as much of a witness's testimony as you think is
4 true and disregard anything you feel is false. How you handle
5 the testimony of a witness who lies to you about a material
6 fact is entirely in your discretion.

7 The law does not require a party to call as witnesses
8 all persons who may have been present at any time or place
9 involved in the case or who may appear to have some knowledge
10 of the matters at issue in the trial. Nor does the law require
11 any party to produce as exhibits every piece of paper or that
12 every thing that relates to this case. Your job is to decide
13 whether the evidence that has been introduced proves by a
14 preponderance of the evidence that the plaintiff is entitled to
15 recover damages from the defendant.

16 The plaintiff in this case is Ms. Marlen Martinez.
17 She's a black Hispanic female born to Honduras. She alleges
18 that her former employer, defendant St. Barnabas Hospital,
19 discriminated against her on the basis of her national origin
20 or ethnicity. Ms. Martinez also alleges that the defendant
21 retaliated against her for engaging in what's call protected
22 activity.

23 Specifically, Ms. Martinez contends that she was
24 discriminated against in the terms and conditions of her
25 employment on the basis of her national origin or ethnicity in

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1 that Filipina nurses were favored for various promotional and
2 educational opportunities and desirable shift assignments. She
3 also alleges that she was fired from her job because she was
4 Honduran rather than Filipina, and also because she complained
5 about the discrimination that she believed she had suffered in
6 the past because of her national origin.

7 The defendant denies that it violated Ms. Martinez's
8 rights in any way. Defendant maintains that employment
9 decisions affecting Ms. Martinez were based on employment
10 criteria unrelated to national origin or ethnicity, and that
11 her termination had nothing to do with her complaints of
12 alleged discrimination.

13 Let's start with the discrimination claim. Ms.
14 Martinez alleges that she was discriminated against by the
15 defendant because of her national origin or ethnicity, in
16 violation of Title VII of the Civil Rights Act of 1964, the New
17 York State Human Rights Law, and the New York City Human Rights
18 Law. It is unlawful under all three statutes for an employer
19 to intentionally discriminate against an employee because of
20 the employee's national origin or ethnicity. The standards for
21 evaluating whether Ms. Martinez has proven her claim are
22 effectively identical under all three laws. It's just that we
23 have federal, state and city laws that all address the same
24 thing.

25 In order to prevail on her claim national origin or

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1 ethnicity discrimination, Ms. Martinez must prove by a
2 preponderance of the evidence four different things.

3 First, Ms. Martinez is from Honduras. She is alleging
4 discrimination on the basis of her national origin or
5 ethnicity. She belongs to a protected class. You need not
6 deliberate on this first element.

7 Second, she has the burden of proving that she
8 performed her job in a satisfactory manner. The parties have
9 stipulated that Ms. Martinez received her license from the
10 State of New York education department and became registered to
11 practice in the State of New York as a registered professional
12 nurse. So there is no dispute that she was qualified to be a
13 nurse as St. Barnabas Hospital. There is also no dispute that
14 Ms. Martinez was performing her job in a satisfactory manner,
15 at least until September 14, 2009, and evening about which you
16 have heard a great deal of disputed testimony.

17 Third, Ms. Martinez must have suffered an adverse
18 employment action. An adverse employment action is any action
19 that materially changes the terms and conditions of an
20 individual employment for the worst. Not being promoted, being
21 denied the training necessary to qualify for promotion, being
22 denied more desirable shifts, and being fired, all of those
23 things have been held to be materially adverse changes to an
24 employment.

25 Finally, Ms. Martinez must prove by a preponderance of

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1 the evidence that the adverse employment actions about which
2 she complained occurred under conditions giving rise to an
3 inference that they were motivated in whole or in part by her
4 national origin or ethnicity, i.e., that she was Honduran as
5 opposed to Filipina. She was not Filipina.

6 A plaintiff establishes unlawful discrimination when
7 she demonstrates that some factor prohibited by law, in this
8 case national origin or ethnicity, was at least part of the
9 reason for an employer's decision about some term or condition
10 of employment. Note that the plaintiff need not prove that her
11 national origin or ethnicity was the only factor motivating an
12 adverse employment decision. But she must prove that her
13 ethnicity or national origin was a substantial or motivating
14 factor in the employment decisions about which she complains.

15 The hospital argues that reasons other than
16 plaintiff's national origin or ethnicity motivated the alleged
17 adverse employment actions about which Ms. Martinez complains,
18 namely, not being promoted, being denied the training necessary
19 to qualify for promotion, and being denied more desirable
20 shifts. The defendant also argues that it terminated Ms.
21 Martinez because she committed various infractions of hospital
22 rules and then failed to show interest in retaining her
23 employment when the hospital tried to contact her.

24 The hospital does not have to prove that these were
25 the real reasons for its actions. Rather the plaintiff has to

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1 prove both that they are not the real reasons for the
2 hospital's actions and that at least part of the real reasons
3 why these things happened to her is that she was not Filipina
4 but was Honduran.

5 Even if you do not believe that the hospital took some
6 adverse action against the plaintiff for the reasons it gave
7 you, your verdict must be for defendant unless the plaintiff
8 proves that the defendant took these actions because she was
9 not Filipina.

10 I caution you that it is not enough that the plaintiff
11 is a member of a protected class and that she suffered an
12 employment decision that she believes was adverse. Put
13 otherwise, the plaintiff does not satisfy her burden of proof
14 simply by asserting, I belong to a protected class, in this
15 case being Honduran, non-Filipina origin, something bad
16 happened to me at work, therefore, defendant discriminated
17 against me. That's a false syllogism. The plaintiff must
18 prove that the reason or at least part of the reason why
19 something bad happened to her at work is the fact that she was
20 Honduran rather than Filipina.

21 I caution you that is not your job to judge the wisdom
22 of the defendant's actions. Keep in mind that an employer has
23 the right to make employment decisions for any reason, good,
24 bad, or no reason at all, as long as the employer does not
25 discriminate in a manner prohibited by law. You may disagree

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1 with an employer's decision about giving certain shifts or
2 benefits or education or promotions or you may disagree with an
3 employer's decision to fire an employee, but unless the
4 plaintiff proves that the decision was motivated by illegal
5 discrimination, you can't question it.

6 I should tell you that when you are thinking about
7 this, you need to think about the different things the
8 plaintiff has alleged individually so that it's very clear that
9 all 8 of you agree either the plaintiff was or was not a victim
10 of discrimination as to the same thing. If 4 of you thought
11 that she was a victim of discrimination because she didn't get
12 good shifts and 4 of you thought that she was a victim of
13 discrimination in her firing, that's not a unanimous verdict.
14 All 8 of you have to agree on the same thing or things that
15 were discriminatory.

16 In addition to alleging that she was fired because she
17 was Honduran rather than Filipina, this only goes to
18 termination, in addition to alleging that she was fired because
19 she was Honduran rather than Filipina, Ms. Martinez alleges
20 that she was fired in retaliation for complaining about the
21 discrimination she believes she experienced.

22 It is unlawful to retaliate against an employee for
23 complaining about discrimination in the workplace. Such
24 retaliation is unlawful under all three of those statutes that
25 I already told you about, Title VII of the Civil Rights Act of

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1 the 1964, the New York State Human Rights Law, and the New York
2 City Human Rights Law.

3 In order to find for Ms. Martinez on this claim, you
4 must find that she proved each of the following three elements
5 by a preponderance of the evidence.

6 First, Ms. Martinez must have engaged in a protected
7 activity. Complaining about perceived discrimination on the
8 basis of one's national origin or ethnicity is what we call
9 engaging in a protected activity. It is illegal to retaliate
10 against, to punish an employee for engaging in protected
11 activity, for complaining about discrimination.

12 You will note that I said complaining about perceived
13 discrimination when I started, and that's because Ms. Martinez
14 is not required to prove that she was in fact the victim of
15 discrimination in order to prevail on her retaliation claim.
16 She must prove, however, that she was acting under a good faith
17 and reasonable belief that the conduct about which she
18 complained was unlawful discrimination.

19 If an employee reasonably and in good faith believes
20 that she experienced national origin or ethnicity
21 discrimination, then complaining about or opposing that
22 discrimination -- let me start that sentence again.

23 If an employee reasonably and in good faith believes
24 that she has experienced national origin or ethnicity
25 discrimination and then she complains about or opposes that

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1 discrimination, her employer cannot retaliate against her for
2 complaining. Protected activity can include actions such as
3 making oral or written complaints to supervisors about
4 perceived discrimination.

5 The plaintiff is also required to prove by a
6 preponderance of the evidence that the supervisors who caused
7 her to be fired, the decision-makers, one or more, it depends
8 on what you find, were aware that she had engaged in protected
9 activity, that she had complained about perceived
10 discrimination. Obviously, if the person or people who fired
11 Ms. Martinez did not know that she had complained about
12 discrimination, they logically could not have decided to fire
13 her because she engaged in protected activity.

14 Complaints about the work environment that are not
15 related to some factor prohibit by law are not protected
16 activity under the antidiscrimination statutes. For example,
17 complaining that the workplace is too loud, that's not
18 protected under the antidiscrimination statutes. But
19 complaints about discrimination based on ethnicity or national
20 origin are protected activity under the relevant laws.

21 Second, Ms. Martinez must have suffered an adverse
22 employment action. Under federal and state law, retaliation
23 must consist of a materially adverse employment action. The
24 definition of materially adverse employment action is slightly
25 different in the context of retaliation from the definition I

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1 gave you in the context of discrimination.

2 for retaliation purposes, a materially adverse
3 employment action means any action that could dissuade a
4 reasonable employee from making or supporting a charge of
5 discrimination, could dissuade a reasonable employee from
6 complaining about it, from engaging in protected activity.

7 Under New York City law, an employee need only
8 experience an employment action that is adverse not materially
9 adverse. But under city law, the definition of adverse
10 employment action is actually quite similar to the federal
11 definition of materially adverse employment action. The
12 retaliatory or discriminatory act complained of needs to be
13 something that is reasonably likely to deter a person from
14 engaging in protected activity.

15 In this case where the allegation is that Ms. Martinez
16 lost her job in retaliation for her complaints, any distinction
17 between federal and local law, any semantic distinction between
18 the two is really inconsequential. Fear of being fired is both
19 something that could deter a reasonable person from complaining
20 about discrimination and that would be reasonably likely to
21 deter a person from engaging in protected activity. So you can
22 assume that this element is met under federal, state, and local
23 law.

24 Finally, Ms. Martinez must show by a preponderance of
25 the evidence that she was fired because of her participation in

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Charge

1 protected activity. As was true with the claim of
2 discrimination, she need not prove that retaliation was the
3 only or even the principal reason for her termination. But her
4 complaints about discrimination must have been a substantial or
5 motivating factor in the decision to fire her.

6 In reaching your determination about causation, you
7 should consider not discuss the timing of the alleged adverse
8 employment action but the totality of the evidence bearing on
9 the question of caution.

10 The defendant has argued that reasons other than Ms.
11 Martinez's national origin or ethnicity motivated the decision
12 to end her employment. Specifically, the defendant argues that
13 it terminated Ms. Martinez because she mistakenly administered
14 morphine to a patient, altered time entries on the patient's
15 state-mandated narcotics control sheet, and then declined to
16 cooperate in the ensuing investigation, thereby indicating a
17 lack of interest in retaining her position.

18 Ms. Martinez disputes that. You all know that.
19 That's really what you did hear. That's what 95 percent of
20 this trial was about.

21 The defendant does not have to prove that it fired Ms.
22 Martinez for the reasons I just summarized for you. The
23 hospital is only required to articulate some legitimate
24 nonretaliatory reason for its actions, and it has done so.
25 That being the case, Ms. Martinez has the burden to prove two

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Charge

1 separate things. Plaintiff must proof that the defendant did
2 not fire her for the reason it gave you, i.e., that its reason
3 was pretextual, and plaintiff must also prove that the real
4 reason the hospital fired her, at least part of the real reason
5 the hospital fired her, was the fact that she had in the past
6 complained about discrimination against her because she was
7 Honduran rather than Filipina.

8 Once again I remind you of your role here. You are
9 not to judge the wisdom of the defendant's actions, remembering
10 that it had a right to discharge Ms. Martinez for a bad reason,
11 a good reason, or no reason at all, so long as it did not
12 discharge her because she complained about discrimination on
13 the basis of her ethnicity and national origin.

14 You may disagree with the reason the hospital gave for
15 firing Ms. Martinez. You may even disbelieve the hospital when
16 it said it fired Ms. Martinez for reasons relating to the
17 missing morphine incident. But unless Ms. Martinez proves by a
18 preponderance of the evidence that the hospital fired her
19 because she had complained of discrimination on the basis of
20 her national origin, she cannot prevail on her retaliation
21 claim.

22 If you disbelieve the reasons the defendant gave for
23 its treatment of Ms. Martinez, you may infer the ultimate fact
24 of retaliation, but you are not required to do so. Remember,
25 the ultimate burden of proof rests with Ms. Martinez, who must

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Charge

1 demonstrate by a preponderance of the evidence that retaliation
2 for her complaint of national origin or ethnicity
3 discrimination was a substantial or motivating factor in the
4 defendant's decision to fire her.

5 In proving her claim retaliation, Ms. Martinez is not
6 required to produce direct proof of unlawful motive or intent,
7 or design. You, members of the jury, may infer motive, intent,
8 or design, even if they are not admitted, from the existence of
9 other facts and from conduct of the defendant.

10 I will now instruct you about damages. You should
11 draw no inference from the fact that I am telling you this that
12 I have concluded that the defendant is liable to Ms. Martinez.
13 That's your decision to make. If you find that Ms. Martinez
14 has not sustained her burden of proof on her claim of
15 discrimination and retaliation, then there is no need even to
16 consider damages on that claim. You will simply report a
17 verdict in favor of the defendant on that claim. But if find
18 that Ms. Martinez has proved all the necessary elements of
19 either/or both of her claims, you will then consider the
20 question of damages against the defendant.

21 Whether damages are actually to be awarded in this
22 case and if so in what amount are matters for you the jury to
23 decide in accordance with my instructions.

24 If you conclude that the defendant violated one or
25 more of Ms. Martinez's legal rights, you must award her such

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Charge

1 sum of money as you believe will fairly and justly compensate
2 her for any injury you believe she sustained as a direct
3 consequence of that violation. By injury I mean pain and
4 suffering to date, future pain and suffering, mental anguish,
5 shock or discomfort that you find Ms. Martinez has suffered
6 because of these events. Pain and suffering can relate to
7 physical pain and suffering or to emotional distress resulting
8 directly from or as a natural consequence of the alleged
9 wrongdoing.

10 You may award actual damages only for those injuries
11 that you find Ms. Martinez has proven by a preponderance of the
12 evidence to have been the direct result of discrimination
13 and/or retaliation against her. If you find that the plaintiff
14 suffered injury but those damages resulted from an act that did
15 not constitute discrimination or retaliation, then you may not
16 award damages to compensate plaintiff for the injury.

17 Compensatory damages must not be based on speculation
18 or sympathy. They must be based on the evidence presented at
19 the trial and only on the evidence.

20 Lost earnings are not part of compensatory damages.
21 If you decide that the plaintiff experienced discrimination or
22 retaliation or both, it will be my job to calculate any lost
23 earnings.

24 As part of her compensatory damages, Ms. Martinez
25 seeks damages for pain, suffering and emotional distress. You

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Charge

1 may only compensate Ms. Martinez for any pain, suffering and
2 emotional distress as you find was caused by the defendant's
3 conduct. You may not award such damages for pain, suffering
4 and emotional distress as the plaintiff may have suffered for
5 any other reason.

6 In awarding pain and suffering damages you must be
7 guided by dispassionate common sense. You must use your sound
8 judgment in fixing an award of damages drawing reasonable
9 inferences from the facts in evidence. Again, you may not
10 award damages based on sympathy, speculation or guesswork.

11 I remind you that Ms. Martinez is seeking to hold the
12 defendant liable for her termination under two separate
13 theories of recovery: national origin or ethnicity
14 discrimination and retaliation. She does not get to recover
15 twice for the same injury. Even if you were to find that the
16 plaintiff prevailed on both of her theories about why her
17 termination was unlawful, she is not entitled to recover double
18 damages for her termination.

19 Now, the verdict that you ladies and gentlemen reach
20 must represent the considered judgment of each of you
21 individually. In order for you to return a verdict, it's
22 necessary that all 8 of you agree on the verdict. The verdict
23 must be unanimous. It is your duty as jurors to consult with
24 one another and to deliberate with a view to reaching an
25 agreement if you can do so without violence to your individual

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Charge

1 judgment. You each must decide the questions raised by this
2 case for yourself but you can only do that after impartially
3 considering all the evidence with your fellow jurors.

4 I usually stop here and tell a story about my
5 nightmare trial when one of the jurors went back in the jury
6 room and announced to his fellow jurors, this is the way I see
7 it, my way or the highway basically. He refused to listen to
8 what other the jurors thought about the evidence. He was not
9 to talk about it. Eventually he turned his chair around and
10 faced the wall, opened his newspapers. Needless to say, that
11 jury did not reach a verdict. That was not a deliberating
12 jury. Deliberating jurors share their own views about the
13 evident and then listen to their fellow jurors and listen with
14 an open mind, that's a mind that's capable of being persuaded.

15 In the course of your deliberations don't hesitate to
16 reexamine our own views and change your opinion if you become
17 convinced by the arguments of the other jurors that your
18 original view of the evidence was erroneous. By the same
19 token, don't surrender your honest conviction about the weight
20 or the effect of the evidence just because your fellow jurors
21 feel differently or merely for the purpose of returning a
22 verdict.

23 Remember at all times you are not partisans; you are
24 judges, judges of the facts. Your sole interest is to seek the
25 truth from the evidence in the case.

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1 When you retire you should elect one of the 8 of you
2 to be your foreperson. The foreperson will preside over your
3 deliberations whatever that means to you. I don't know what
4 it's going to mean to you. Some people are very bossy
5 forepeople who organize things; some people are very catch as
6 catch can. It means whatever you want it to mean. The
7 foreperson will speak for you all here in open court. The
8 foreperson's vote is not entitled to any greater weight than
9 that of any individual juror.

10 If it becomes necessary during your deliberations for
11 you to communicate with me, you will send out a note, signed by
12 your foreperson, or if the foreperson goes on strike, it only
13 happened to me once, a foreperson did one time go on strike, so
14 the other jurors signed the note and that was appropriate, put
15 the date and the time and the signature. None of you should
16 ever try to communicate with me by any means other than by a
17 signed writing. I will never communicate with any of you on
18 any subject touching on the merits of this case except in
19 writing or orally here in court.

20 The bailiff in this case is Ben; Ben is your guardian.

21 (Law clerk sworn)

22 THE COURT: That doesn't mean we are going to keep you
23 here all night, but when you are in the building you are in
24 that room. You are in that room, no getting out of the room
25 without us knowing about it. That happened once too. It was

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Charge

1 like ants out of the ant farm, we didn't know where anybody had
2 gone, it took us 45 minutes to find everybody. Please, he is
3 your jailer. Now, he is not allowed to communicate with you
4 about this case either, so don't try to engage him in any
5 conversation about the case.

6 If you should happen to send me a note, remember not
7 to tell me what the vote is: Judge, we are 5 to 3 in favor of
8 the defendant on the question of discrimination and we would
9 like to know the following. No. I am not supposed to know. I
10 am really not supposed to know any vote except 8 to nothing.
11 Don't tell me what the vote is please. If a note is about to
12 go out with a vote recorded, somebody stop it.

13 All the exhibits that were admitted into evidence will
14 be with you in the jury room and the charge will go back with
15 you in the jury room so you can review it during your
16 declarations. But if you don't understand it, don't just sit
17 there and look at the paper. Send out a note and say, judge,
18 we need you to explain causation once again and I will. I will
19 do it. I have been known to do better the second time than I
20 do the first time sometimes because you jurors frame very
21 precise questions that explain to me what it is that's
22 confusing to you. So don't assume that because I am sending
23 the charge back with you, you can't ask me for guidance. You
24 can and I will give it to you to the best of my ability.

25 You know that if you need your recollection refreshed

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Charge

1 about testimony, the way you do that is to send out a note
2 signed by your foreperson. And we will do that in one of two
3 ways. (A) we have the transcript of last week's proceedings,
4 thanks to last week's wonderful court reporters, and we will go
5 through the transcript and we will find the relevant pages. We
6 will copy them and we will send them back to you. Or if we
7 don't have a transcript, we will bring you out here and we will
8 have the court reporter read the relevant portions to you.

9 We have to go through the notes or through the
10 transcript with each other, with the court reporter, and that
11 takes some time. So first of all, don't ask for readback
12 unless you have to. Don't ask for readback for the fun of
13 watching the court reporter interpret her hieroglyphics which
14 is a miraculous things to watch, it really is. But don't do
15 that. Exhaust everybody's recollection of the evidence and
16 then if you have any doubt, any question, send out that note,
17 and we will find the relevant portion of the testimony.

18 I can pretty much guarantee that you will reach that
19 moment and you will send out note right after I sent the
20 lawyers to lunch, just before I have some criminal matter
21 that's going to be taken care. It always happens that way, but
22 we will get to it rapidly and then we will get you the
23 testimony.

24 You heard reference in the closings to the verdict
25 sheet. You will record your verdict on the verdict sheet that

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Charge

1 I am sending back into the jury room with you. The verdict
2 sheet contains my initials and those of counsel indicating that
3 we all have seen and reviewed it. Your foreperson should fill
4 it out as you reach your verdict and sign and date it when you
5 are done deliberating.

6 You will note that under the heading labeled
7 discrimination you have to answer two questions. First you
8 have to decide whether or not the plaintiff experienced any
9 discrimination in the workplace based on her ethnicity or
10 national origin. Then if and only if your answer to that
11 question is yes, we ask you to write down what adverse act or
12 acts by the hospital were discriminatory. Write down every act
13 that you conclude by unanimous verdict was motivated by
14 discrimination based on plaintiff's ethnicity or national
15 origin.

16 When you are done deliberating, please send out a note
17 saying we have reached verdict. Do not send out the verdict
18 sheet with the note. The foreperson should bring the verdict
19 sheet out into the courtroom when you come to deliver your
20 verdict.

21 I would like to see counsel over at the sidebar with
22 the court reporter.

23 (At the sidebar)

24 THE COURT: Does the plaintiff have an objections to
25 the charge as delivered.

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Charge

1 MR. NUWESRA: Your Honor, on page 5, although you did
2 read it correctly, it's indicated here and/or retaliation.

3 THE COURT: I have already written it down. I will
4 give you my copy with the notes. We are going to change his to
5 her. Sorry about that; I apologize to your client.

6 MR. NUWESRA: The only other thing, page 20. I have
7 it here; this is the case regarding the business exception.

8 THE COURT: You can argue credibility. That has
9 nothing to do with this charge. I am not going to change the
10 charge. You have your exception. I am not charging
11 credibility there. I am charging the law on discrimination.
12 Credibility is yours to argue. I charged credibility earlier.

13 Anything else.

14 MR. NUWESRA: No. It would have been the same thing
15 for 25.

16 THE COURT: Thank you.

17 MR. GARLAND: Page 23, the third paragraph, I should
18 have caught this earlier, the third to last line where it
19 starts on the patient's statement.

20 THE COURT: Page 23, third paragraph begins under New
21 York City Law.

22 MR. GARLAND: This is under causation, number 3, this
23 is the draft that we have.

24 THE COURT: You got a new one.

25 THE LAW CLERK: It's changed a little bit.

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1 THE COURT: What is it.

2 MR. GARLAND: The paragraph that starts, the defendant
3 has argued, the fourth line says on the patient's
4 state-mandated narcotics control sheet, the word patient
5 shouldn't be there.

6 THE COURT: You are correct. I apologize.

7 MR. GARLAND: Nothing further.

8 THE COURT: Fine.

9 (In open court)

10 THE COURT: I have to make one correction on the
11 charge and I will. When I talked about time entries, I said
12 the patient's state-mandated narcotics control sheet. It's not
13 the patient's state-mandated narcotics control sheet; it's just
14 the narcotics control sheet. So forget about the reference to
15 patient there.

16 Deliberate only when all of you are together in the
17 room. If anybody is out of the room, no reason for you to to
18 be deliberating because you really all need to hear everything
19 that everybody is saying so that in case somebody says the
20 thing that makes the penny drop, you will all be there to hear
21 it. So, just go ahead and deliberate only when you are all
22 together and wait until everybody, if somebody goes out on a
23 smoking break or somebody has to go to the restroom, wait until
24 everybody is back before you start deliberating again.

25 (Continued on next page)

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Charge

1 THE COURT: I have nothing better to do until such
2 time as you reach your verdict than to pay attention to you.
3 So you are my first charge.

4 What I'm going to let you do is go back for 20
5 minutes, half an hour, get organized, select your foreperson,
6 start talking a little bit. Then we'll break at five for the
7 day, and tomorrow morning you'll be back at 9:30. Go right to
8 the jury room. When everybody is there, knock on the door,
9 stick your head out, let Ben know that you're all there, and
10 start. You don't have to see me. All right?

11 Okay. We're going to get everything together and send
12 it back to you. You are now free to discuss the case.

13 (Jury excused)

14 (Continued on next page)

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(In open court; jury not present)

THE COURT: Okay. Can we make sure that the exhibits, the actual marked exhibits, are ready to go back? The verdict sheet you have here.

MR. GARLAND: Your Honor, just a couple of-- one question -- one comment on the exhibits. One, plaintiff's tax returns originally at-- they're in evidence, but I see that they were necessarily not going back with the jury since the Court's decided to address the lost wages issue.

MR. NUWESRA: May I, your Honor?

THE COURT: Do you really want her tax returns to go back?

MR. NUWESRA: Yes, your Honor, because she testified that she was interested in her job. She was making \$99,000, \$96,000, and I told them they could look at it.

THE COURT: All right. They can go back.

MR. NUWESRA: Thank you.

MR. GARLAND: And, second, your Honor, I want to be sure that we send back Defendant's Exhibit 22 --

THE COURT: Your job is to make sure that every exhibit that was admitted into evidence is in a pile, the original exhibits, so that they can go back. That's your job now.

MR. NUWESRA: Your Honor, DX-22 was never agreed upon.

THE COURT: Excuse me. Defendant's Exhibit-- give me

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1 a copy of Defendant's Exhibit's 22 and point to me in the
2 transcript where I said it was admitted. That's the
3 determinative factor. Nothing else matters. Nothing else
4 matters.

5 MR. GARLAND: All right, your Honor. We have to pull
6 out the transcript first. I believe it's from Thursday,
7 Thursday morning.

8 THE COURT: I have no memory of it. Find it in the
9 transcript. Yes, it should have come in, but find it in the
10 transcript.

11 MR. GARLAND: Your Honor, while Mr. Fullerton looks,
12 that came up in the discussion when I had said to the Court
13 that nothing should come in on the grievance of the
14 termination. And then your Honor had said to go ahead-- we can
15 leave it in, the grievance letter, but then you could put in
16 DX 22. But we'll try to get it.

17 THE COURT: Okay.

18 MR. GARLAND: I just wanted to set the stage as I
19 recall it.

20 THE COURT: Recall means nothing. First of all, you
21 should look at the transcript of the final pretrial conference,
22 which is when all of the exhibits were to have been admitted.
23 Then there were a few exhibits that were admitted during the
24 trial. All have you to do is point to something in the
25 transcript. But once you all rested and closed, I'm not

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1 allowing anything that I had not specifically admitted to go to
2 the jury no matter how relevant it is.

3 MR. GARLAND: Okay. Your Honor, I am looking at page
4 274 --

5 THE COURT: Give me a transcript, please.

6 MR. GARLAND: I'm sorry, it's Thursday, October 11th.

7 THE DEPUTY CLERK: October 11th?

8 THE COURT: Page 274.

9 MR. GARLAND: Right, line 15.

10 THE COURT: Where does it say that this is Plaintiff's
11 Exhibit 22 we're talking about?

12 MR. GARLAND: It's Defendant's Exhibit 22. I did not
13 say --

14 THE COURT: No, indeed, you referenced Defendant's
15 Exhibit 21. This conversation I remember vividly. It was not
16 about that document. It was Defendant's 21. Sorry, you
17 screwed up. It doesn't come in. You did not-- forget about
18 referencing it specifically --

19 MR. GARLAND: Your Honor, if I may, respectfully.

20 THE COURT: You had to tell me the exhibit and the
21 exhibit number. I was looking at 21. I had 21 in my hand. I
22 know exactly what I was ruling at that moment. I had never
23 seen this letter and I'm not letting it in now. You have your
24 exception.

25 MR. GARLAND: Thank you, your Honor.

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1 THE COURT: You did not give me that letter last
2 Thursday. You gave me 21.

3 MR. GARLAND: Well, your Honor --

4 THE COURT: You gave me 21.

5 MR. GARLAND: You had 21 in front of you, that's
6 correct, your Honor, but what I said was "It was the union's
7 grievance, and at the pretrial we withdrew the exhibit
8 immediately following it." That's 22. And then --

9 THE COURT: Does it say --

10 MR. GARLAND: That letter --

11 THE COURT: Excuse me. Does it say in the transcript
12 that's 22?

13 MR. GARLAND: No, your Honor, it doesn't.

14 THE COURT: Too bad.

15 MR. GARLAND: We were also looking at the pretrial. I
16 was trying to explain what I was doing --

17 THE COURT: Too bad. Too bad. Too bad. Doesn't go
18 back.

19 MR. GARLAND: Thank you, your Honor.

20 THE COURT: You're supposed to find these things out
21 before you close, not after you close.

22 MR. GARLAND: Thank you, your Honor.

23 THE COURT: Not now. I'm not reopening closings so
24 that he can address that.

25 MR. NUWESRA: I'm just going to review these so that

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1 they can go to the jurors, your Honor.

2 THE COURT: The actual marked original exhibits.

3 MR. NUWESRA: Yes, right.

4 THE COURT: Okay.

5 MR. GARLAND: Not the binders.

6 THE COURT: The actual marked original exhibits.

7 MR. GARLAND: May I ask the Court, do you have-- has
8 the Court read the stipulated facts?

9 THE COURT: The stipulated facts. Where are the
10 stipulated facts? They have to be up here somewhere. Part of
11 them you had to cut them out of the pretrial order, but they
12 weren't all in there.

13 Here, these two pages, you have to white out this.

14 THE DEPUTY CLERK: Okay.

15 THE COURT: Then there's a stipulation with the rest
16 of them because I read-- or we can just photocopy the pages
17 from the transcript actually. Photocopy the pages from the
18 transcript where I read them. That will be helpful.

19 (Recess)

20 THE COURT: Okay. Case on trial continues. The
21 parties are present; jurors are not present. And the jurors
22 want to go home, so let's bring them out.

23 (Continued on next page)
24
25

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(In open court; jurors present)

THE COURT: Okay. Have a seat. Really fast, go home, sleep, rest, refresh yourselves, and we'll work very hard tomorrow. Don't discuss the case. Keep an open mind. When you arrive tomorrow morning, you will be back in the jury room. Remember, as soon as you're all there, knock on the door, let Ben know that you're here, and you should resume your deliberations. If you need me, I'm here for you. I'll see you tomorrow.

(Jury excused)

THE COURT: Okay. Hopefully we'll get a verdict sometime tomorrow. We will go until 4:00 tomorrow.

Off the record.

(Discussion off the record)

(Adjourned to October 16, 2012, at 9:30 a.m.)

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